

89-449 (2)

No.

SEP 6 1989

JOSEPH R. SPANIEL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

UNITED SERVICES AUTOMOBILE ASSOCIATION, *et al.*,
Petitioners

v.

CONSTANCE FOSTER, INSURANCE COMMISSIONER
OF THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DONALD B. AYER
Counsel of Record
ROBERT H. KLONOFF
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

MICHAEL L. BROWNE
CHRISTOPHER K. WALTERS
W. THOMAS MCGOUGH, JR.
REED, SMITH, SHAW & MCCLAY
2500 One Liberty Place
Philadelphia, PA 19103
(215) 851-8100
Counsel for Petitioners



TABLE OF CONTENTS

	Page
Appendix A (court of appeals decision dated May 5, 1989)	1a
Appendix B (court of appeals denial of petition for rehearing and rehearing en banc dated June 9, 1989)	41a
Appendix C (district court decision dated December 23, 1987)	45a
Appendix D (United States Supreme Court denial of petition for certiorari dated January 12, 1987)	67a
Appendix E (court of appeals decision dated June 6, 1986)	68a
Appendix F (district court decision and order dated September 30, 1985)	88a



APPENDIX A

**UNITED STATES COURT OF APPEALS
THIRD CIRCUIT**

Nos. 88-1339, 88-5077, 88-5078 and 88-5121

FORD MOTOR COMPANY and FORD MOTOR CREDIT COMPANY, and THE AMERICAN ROAD INSURANCE COMPANY and FORD LIFE INSURANCE COMPANY, and FIRST NATIONWIDE FINANCIAL CORPORATION and FIRST NATIONWIDE BANK

v.

**INSURANCE COMMISSIONER OF THE
COMMONWEALTH OF PENNSYLVANIA**

Appeal of PENNSYLVANIA ASSOCIATION OF INDEPENDENT INSURANCE AGENTS; JOHN ULRICH, JR.; PROFESSIONAL INSURANCE AGENTS ASSOCIATION OF PENNSYLVANIA, MARYLAND AND DELAWARE, INC.; CHARLES P. LEACH, JR.; PENNSYLVANIA ASSOCIATION OF LIFE UNDERWRITERS; and HAROLD E. ALEXANDER, in 88-1339

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Texas Reciprocal Interinsurance Exchange, USAA CASUALTY INSURANCE COMPANY, a Texas Stock Insurance Company, USAA LIFE INSURANCE COMPANY, a Texas Stock Insurance Company, and USAA ANNUITY AND LIFE INSURANCE COMPANY, a Texas Stock Insurance,

v.

**MUIR, WILLIAM J., III, Acting Insurance Commissioner
of the Commonwealth of Pennsylvania**

Appeal of PENNSYLVANIA ASSOCIATION OF INDEPENDENT INSURANCE AGENTS; JOHN ULRICH, JR.; PROFESSIONAL INSURANCE AGENTS ASSOCIATION OF PENNSYLVANIA, MARYLAND AND DELAWARE, INC.; CHARLES P. LEACH, JR.; PENNSYLVANIA ASSOCIATION OF LIFE UNDERWRITERS; and HAROLD E. ALEXANDER, in 88-5077

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Texas Reciprocal Interinsurance Exchange, USAA CASUALTY INSURANCE COMPANY, a Texas Stock Insurance Company, USAA LIFE INSURANCE COMPANY, a Texas Stock Insurance Company, and USAA ANNUITY AND LIFE INSURANCE COMPANY, a Texas Stock Insurance,

v.

MUIR, WILLIAM J., III, Acting Insurance Commissioner of the Commonwealth of Pennsylvania,

PENNSYLVANIA ASSOCIATION OF INDEPENDENT INSURANCE AGENTS; JOHN ULRICH, JR.; PROFESSIONAL INSURANCE AGENTS ASSOCIATION OF PENNSYLVANIA, MARYLAND AND DELAWARE, INC.; CHARLES P. LEACH, JR.; PENNSYLVANIA ASSOCIATION OF LIFE UNDERWRITERS; and HAROLD E. ALEXANDER

Appeal of Constance Foster, in 88-5078

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Texas Reciprocal Interinsurance Exchange, USAA CASUALTY INSURANCE COMPANY, a Texas Stock Insurance Company, USAA LIFE INSURANCE COMPANY, a Texas Stock Insurance Company, and USAA ANNUITY AND LIFE INSURANCE COMPANY, a Texas Stock Insurance,

v.

MUIR, WILLIAM J., III, Acting Insurance Commissioner of the Commonwealth of Pennsylvania,

PENNSYLVANIA ASSOCIATION OF INDEPENDENT INSURANCE AGENTS; JOHN ULRICH, JR.; PROFESSIONAL INSURANCE AGENTS ASSOCIATION OF PENNSYLVANIA, MARYLAND AND DELAWARE, INC.; CHARLES P. LEACH, JR.; PENNSYLVANIA ASSOCIATION OF LIFE UNDERWRITERS; and HAROLD E. ALEXANDER

Appeal of United Services Automobile Association,
USAA Casualty Insurance Company,
USAA Life Insurance Company, and
USAA Annuity and Life Insurance Company, in 88-5121

Argued Oct. 5, 1988

Decided May 5, 1989

William R. Balaban, Balaban & Balaban. Harrisburg, Pa., Jonathan B. Sallet (argued), Miller, Cassidy, Larroca & Lewin, Washington, D.C., for appellants PA Assoc. of Ind. Ins. Agents in 88-1339, and 88-5077, and for appellees, PA Assoc. of Ind. Ins. Agents in 88-5121 and 88-5078.

Harvey Bartle, III (argued), Dechert, Price & Rhoads, Philadelphia, Pa., for appellee Ford in 88-1339.

John B. Knorr, III (argued), Chief Deputy Atty. Gen., Office of Atty. Gen., Harrisburg, Pa., for appellee, Constance Foster in 88-5121, 88-5077 and 88-5078.

Christopher K. Walters (argued), Reed, Smith, Shaw & McClay, Philadelphia, Pa., Robert B. Hoffman, Reed, Smith, Shaw & McClay, Harrisburg, Pa., for appellant United Services Auto. Ass'n, in 88-5121, 88-5077 and 88-5078.

Before HIGGINBOTHAM, MANSMANN and GREENBERG, Circuit Judges.

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., Circuit Judge.

On these appeals we are revisited by significant questions concerning the appropriate applications of the doctrines of abstention and preemption, and of the dormant commerce clause of the United States Constitution. Although all such cases present issues that require delicate balancing, these cases are particularly sensitive because they concern both a federal scheme designed to assist the nation's failing savings and loans companies and the important state interest in regulating the state insurance

industry. Upon our review of the contentions raised on these appeals, we conclude: (1) that the principles of *Younger* do not require abstention in these cases; (2) that Pennsylvania's statute that precludes companies that sell insurance in Pennsylvania from affiliation with savings and loan institutions is preempted to the extent that the state statute is applicable to companies authorized pursuant to federal legislation to purchase failing thrifts and (3) the state statute is not preempted in its application to other than failing thrifts and, in that application, does not violate the Commerce Clause. In our view, that statute neither discriminates impermissibly in favor of in-state residents, nor presents a burden on interstate commerce and, it therefore, does not present harm precluded by the Commerce Clause. Accordingly, we will affirm the decisions of the district courts in these cases in part and reverse in part.

I. Background

These appeals are taken from the judgments of district courts in two declaratory actions that were filed to determine the constitutionality of § 641 of the Insurance Department Act of 1921, as amended, P.L. 1148 (1987), *codified at* 40 Pa.Stat. Ann. (Purdon 1987 Supp.).¹ Although the cases are wholly separate and were filed independently, they were consolidated for the purposes of appeal because of the commonality of the underlying facts and the significant identity of the issues presented for review. The facts of neither case are in dispute. For

¹ In pertinent part, § 641 provides that

[n]o lending institution, . . . bank holding company, savings and loan company or any subsidiary or affiliate of the foregoing, or officer or employee thereof, may directly or indirectly, be licensed or admitted as an insurer . . . in this State

40 Pa.Stat. Ann. § 281(b) (Purdon 1987 Supp.). Such institutions may be licensed to "sell credit life, health and accident insurance and to sell and underwrite title insurance in accordance with regulations promulgated by the Insurance Commissioner." *Id.*

the purposes of this discussion, we review the facts and procedural histories of each case briefly:

A. Pennsylvania Ass'n of Independent Insurance Agents v. Ford Motor Co. ("Ford")

In December 1985, Ford Motor Company ("Ford") acquired the First Nationwide Financial Corporation ("FNFC") which is a California based savings and loan holding company. Ford also acquired FNFC's subsidiary, First Nationwide Savings which Ford renamed First Nationwide Bank ("FNB"). At that time, FNB had offices located in California, New York, Florida and Hawaii.

In June 1986 Ford, through its new subsidiaries FNFC and FNB, arranged to purchase two Ohio based savings and loan companies, ("S & L's") that were failing and had been placed into receivership with the Federal Savings and Loan Insurance Corporation ("FSLIC"). FSLIC had solicited applications for the purchase of these S & L's pursuant to federal statutory guidelines designed to limit liability exposure for these failed companies which were federally insured. See 12 U.S.C. § 1730a (1982).² The

² That statute provides for the "[r]egulation of holding companies." In its several sections, it provides explicit guidelines for, *inter alia*, the "registration and examination" of holding companies, see § 1730a(b); regulations of "[h]olding company activities," see § 1730a(c); "transactions," see § 1730a(d) and "acquisitions," see § 1730a(e)(1). Significant to the present cases, that statute also provides for "[e]mergency thrift acquisitions." See § 1730a(m). In pertinent part, that section provides that:

[n]otwithstanding any provision of the laws or constitution of any State or any provision of Federal law, except as provided in subsections (c), (e)(2) and (1) of this section, and in clause (iii) of this subparagraph, the Corporation, upon its determination that severe financial conditions exist which threaten the stability of a significant number of insured institutions, or of insured institutions possessing significant financial resources, may authorize, in its discretion and where it determines such authorization would lessen the risk to the Corporation, an insured institution that is eligible for assist-

failing Ohio S & L's were merged with FNB to create a larger national savings and loan entity. Subsequently, in February 1987, Ford requested and was granted permission by the Federal Home Loan Bank Board to open two additional branches of the newly constituted FNB. One of these new branches was in Pennsylvania.

Among the numerous subsidiary companies that are owned and controlled by Ford are the American Road Insurance Company ("American Road"), which is a wholly owned subsidiary of Ford, and the Ford Life Insurance Company ("Ford Life"), which is wholly owned by American Road. Both of these companies are licensed to sell insurance in Pennsylvania and have been engaged in that business for over twenty years. Ford's simultaneous ownership of these insurance companies and FNB, however, placed it in violation of § 641 of the Pennsylvania insurance act.

Accordingly, in June 1987, three months after FNB's Pennsylvania branch office was opened, Ford filed a complaint in the United States district court for declaratory relief from Pennsylvania's enforcement of that statute which, Ford alleged, was unconstitutional on several grounds. Ford claimed, *inter alia* that, to the extent that the statute placed a restriction upon its ownership of a savings and loan institution, it was preempted by 12 U.S.C. § 1730a(m) (1987). Additionally, Ford contended that § 641 was constitutionally infirm because it was violative of the dormant commerce clause of the United

ance pursuant to section 1729(f) of this title to merge or consolidate with, or to transfer its assets and liabilities to, any other insured institution or any insured bank (as such term "insured bank" is defined in section 1813(h) of this title), may authorize any other insured institution to acquire control of said insured institution, or may authorize any company to acquire control of said insured institution or to acquire the assets or assume the liabilities thereof.

12 U.S.C. § 1730a(m) (1) (A) (i) (1987 Supp.).

States Constitution. The Insurance Commissioner of the State of Pennsylvania ("Insurance Commissioner" or "the Commissioner") filed a reply challenging the merits of the contentions raised by Ford. The Commissioner was joined by the appellants in this case, the Pennsylvania Association of Independent Insurance Agents ("Insurance Agents") who had successfully petitioned the district court for leave to intervene. Together with that motion to intervene, the Insurance Agents also filed a motion to dismiss Ford's complaint in which it petitioned the district court to abstain from adjudication of the complaint pursuant to the *Younger* doctrine of abstention.³ Prior to intervening in the case, the Insurance Agents had filed a complaint with the Insurance Commissioner initiating an administrative proceeding that sought the revocation of American Road's and Ford Life's insurance licenses because those companies were in violation of § 641. Subsequent to the insurance agents' intervention in this case, Ford filed a motion in the district court seeking an injunction of the state administrative proceedings.

Ford also filed a motion for summary judgment on three grounds: it contended that the statute was unconstitutional as a violation of the equal protection clause, that federal legislation preempted the entire field concerning the acquisition and ownership of savings and loans and that federal legislation that specifically addressed the acquisition of failing savings and loan institutions preempted § 641.

³ See *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). That case represents the starting point for a judicial doctrine "designed to protect the institutional autonomy of state governments by limiting the power of federal courts to grant declaratory or injunctive relief against unconstitutional state action in circumstances where parallel state proceedings involving the federal litigants provide them with an adequate forum for airing their constitutional claims." L. Tribe, *American Constitutional Law* 201-02 (2d ed. 1988).

The district court concluded that neither of the first two contentions raised by Ford for summary judgment were meritorious. It concluded, however, that the language and legislative history of § 1730a(m) evinced Congress's clear intent to preempt state laws that hindered the acquisition of failing S & L's and determined, accordingly, that § 641 had been preempted. Because its decision rested on preemption grounds, the district court also held that abstention was improper. The insurance agents challenge each of the district court's conclusions on this appeal.⁴

B. *Foster v. United Services Automobile Ass'n*
("USAA")

The United Services Automobile Association ("USAA") is a group of four Texas based insurance companies that are engaged in the insurance business nationwide. It is licensed to sell insurance in Pennsylvania and has been doing so for a number of years. In 1983, USAA was granted permission by the Federal Home Loan Bank Board and FSLIC to create the USAA Federal Savings Bank in Texas. In accordance with all applicable federal regulations, USAA organized and capitalized that bank, which then began doing business in Texas.⁵ During the following year, the Pennsylvania Insurance Commissioner notified USAA that its simultaneous ownership of the Texas bank and continued sale of insurance policies in Pennsylvania, violated § 641. It advised USAA that pursuant to § 641, it must either cease the sale of insurance in Pennsylvania or divest itself entirely from ownership

⁴ Ford does not cross-appeal from the decision of the district court concerning the alternate bases on which it sought summary judgment. Accordingly, none of these issues are before us on this appeal. Also, the Insurance Commissioner, although a named defendant, does not join as an appellant in this case.

⁵ The record does not indicate—and the insurance commissioner does not contend—that this bank has ever solicited deposits from Pennsylvania citizens, or otherwise done any business in Pennsylvania.

in the Texas bank. USAA filed a complaint in the district court seeking declaratory relief from enforcement of the statute, which it challenged as unconstitutional on its face and as preempted by federal regulation. Subsequent to that complaint, the insurance department commenced state administrative proceedings for the revocation of USAA's license to sell insurance in Pennsylvania and, in light of those proceedings, filed a motion for dismissal in the district court on abstention grounds. USAA cross-filed a motion for summary judgment on the grounds that § 641 was preempted by § 1730a.

The district court concluded that abstention was appropriate under each of three types of abstention: *Younger*, *Pullman*⁶ and *Burford*.⁷ We reversed that decision and held that abstention by the district court under any of these theory was improper. See *United Services Automobile Ass'n v. Muir*, 792 F.2d 356 (3d Cir. 1986), cert. denied, sub nom. *Grode v. United Services Automobile Ass'n*, 479 U.S. 1031, 107 S.Ct. 875, 93 L.Ed.2d 830 (1987) ("*USAA I*"). Accordingly, we remanded this matter to the district court for hearing.

On remand, the Insurance Commissioner again petitioned the district court to abstain. The Commissioner limited this request to *Younger* abstention and contended that this Court's decision in *USAA I* had been overruled by intercedent precedent of the Supreme Court in the case *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986) ("*Dayton Schools*"). The Commissioner argued that *USAA I* had held that *Younger* abstention was inappropriate only because of this Court's view that the State administrative proceedings were an inadequate forum for

⁶ See *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

⁷ See *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943).

the constitutional claims raised. The Commissioner argued that that conclusion was no longer valid in light of *Dayton Schools* and, accordingly, that abstention pursuant to *Younger* was appropriate.

The district court agreed that *USAA I* had been overruled by *Dayton Schools* regarding the issue of *Younger* abstention. It concluded, however, that because of the potential for irreparable harm to USAA, abstention was nonetheless improper. In light of that conclusion, the district court evaluated the merits of the constitutional claims presented. It concluded that USAA's claim that § 641 was preempted by § 1730a was without merit, but determined that § 641 was unconstitutional as a violation of the Commerce Clause.

On this appeal, the Insurance Commissioner and the Insurance Agents challenge the district court's decision not to abstain and its determination that § 641 is unconstitutional. USAA cross-appeals from the decision of the district court that enforcement of § 641 against it is not preempted by the federal regulatory scheme.

II. Abstention

Although the analyses of the district courts regarding this issue arise from different circumstances, the threshold concern of both is whether abstention pursuant to *Younger* was warranted. That doctrine of abstention, characterized as one of equitable restraint, instructs us that due deference must be paid to state proceedings initiated to resolve controversies that raise significant state issues when federal court intervention is sought.⁸ Defer-

⁸ *Younger* abstention precludes intervention by federal courts into on-going state proceedings. The doctrine has been extended, however, to apply to circumstances in which the filing of a federal action preceded the initiation of the state proceedings. See *Hick v. Miranda*, 422 U.S. 332, 349, 95 S.Ct. 2281, 2291, 45 L.Ed.2d 223 (1975) (federal court should abstain in favor of state proceeding initiated subsequent to federal action if no "proceedings of sub-

ence to state proceedings pursuant to *Younger*, however, is not absolute. The appropriate focus of a court's inquiry when the question of *Younger* abstention is raised, therefore, is whether the state proceeding provides an adequate forum for the resolution of the federal claims that have been asserted, see *Dayton Schools*, 477 U.S. at 627, 106 S.Ct. at 2723 (*Younger* principle is applicable to "state administrative proceedings in which important state interests are vindicated, so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim");⁹ and whether deference to the state proceeding will present a significant and immediate potential for irreparable harm to the federal interests asserted. See *Wooley v. Maynard*, 430 U.S. 705, 712, 97 S.Ct. 1428, 1434, 51 L.Ed.2d 752 (1977) (*Younger* abstention improper where federal intervention "necessary in order to afford adequate protection of constitutional rights"); *Kugler v. Helfant*, 421 U.S. 117, 124-25, 95 S.Ct. 1524, 1530-31, 44 L.Ed.2d 15 *reh'g denied*, 421 U.S. 1017, 95 S.Ct. 2425, 44 L.Ed.2d 686 (1975).

stance on the merits" in the federal action have occurred); *USAA I*, 792 F.2d at 365 ("[s]o long as 'the federal litigation was in an embryonic stage and no contested matter had been decided,' the district court may abstain under *Younger*") (quoting *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 929, 95 S.Ct. 2561, 2566, 45 L.Ed.2d 648 (1975)). Thus, despite the fact that in both of these cases the federal declaratory action preceded the initiation of the state proceedings, the inquiry into whether *Younger* abstention should apply was proper because no "proceedings of substance on the merits" had yet occurred in the federal courts.

⁹ This rule has been extended to include non-judicial state court proceedings that provide a full and fair opportunity for hearing of the federal claims. See *Dayton Schools*, 477 U.S. at 627, n.2, 106 S.Ct. at 2723, n. 2; *Gibson v. Berryhill*, 411 U.S. 564, 576-77, 93 S.Ct. 1689, 1696-97, 36 L.Ed.2d 488 (1973) ("administrative proceedings looking toward the revocation of a license to practice medicine may in proper circumstances command the respect due court proceedings"); *Williams v. Red Bank Bd. of Education*, 662 F.2d 1008 (3d Cir. 1981).

In the present cases, we are persuaded that Pennsylvania maintains the significant interest in the regulation of its insurance industry sufficient to support abstention under this doctrine. In light of the Supreme Court's decision in *Dayton Schools*, we are also persuaded that the scheme for administrative adjudication and judicial review of the claims presented is adequate for *Younger* purposes.

A. Abstention And The Adequacy of State Administrative Proceedings

In *USAA I*, this Court held that "administrative proceedings suffice for *Younger* purposes only when they 'are adequate to vindicate federal claims.'" *USAA I*, 792 F.2d at 365. See also *Williams v. Red Bank Bd. of Education*, 662 F.2d 1008 (3d Cir. 1981). In that light, we concluded that because the Insurance Commission proceeding did not provide a forum for the adjudication of the constitutional claims, abstention was inappropriate. See *Middlesex Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982) (*Younger* abstention not available where there is no "adequate opportunity [in the state proceedings] to raise the constitutional claims.").

Subsequent to our decision in *USAA I*, the Supreme Court held that state administrative proceedings that do not provide an opportunity for the resolution of the claimant's constitutional contention, are adequate for *Younger* abstention if the state's judicial review of the administrative proceeding provides opportunity for *de novo* hearing of the constitutional claim. *Dayton Schools*, 477 U.S. at 629, 106 S.Ct. at 2724. Cf. *Watts v. Burkhardt*, 854 F.2d 839 (6th Cir. 1988) (the fact that the state agency would not consider the constitutional claims raised did not preclude *Younger* abstention where the constitutional claims could be presented on review in the state court); *Christ the King Regional High School v. Calvert*, 815 F.2d 219

(2d Cir.) (same), *cert. denied* — U.S. —, 103 S.Ct. 102, 98 L.Ed.2d 63 (1987). Accordingly, we hold now that, to the extent that our decision in *USAA I* concluded that *Younger* abstention is inappropriate in cases where the administrative proceeding itself does not provide a forum for the adjudication of constitutional claims—without regard to the opportunity that exists to pursue those claims on judicial review—it has been overruled by *Dayton Schools*.

In the present cases, this conclusion necessarily results in the determination that the Pennsylvania administrative proceeding in question is sufficient for purposes of *Younger* abstention. The Pennsylvania statutes concerning administrative law and procedure clearly provide for adequate judicial review of state administrative determinations. The statute expressly provides that

[a]ny person aggrieved by an adjudication of a Commonwealth agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals . . .

2 Pa. Cons.Stat. Ann. § 702 (Purdon 1988). Significantly, the statute provides further that

[a] party who proceeded before a Commonwealth agency under the terms of a particular statute *shall not be precluded from questioning the validity of the statute in the appeal*, but such party may not raise upon appeal any other question not raised before the agency (notwithstanding the fact that the agency may not be competent to resolve such question) unless allowed by the court upon due cause shown.

2 Pa. Cons.Stat. Ann. § 703(a) (Purdon 1988) (emphasis added). We read these provisions of the Pennsylvania law to permit the assertion of the unconstitutionality of a statute on judicial review of an administrative proceeding in which that statute has been applied and, in light

of *Dayton Schools*, conclude that the administrative proceedings in this case are sufficient for application of *Younger* principles.

Our inquiry into the propriety of *Younger* abstention for the present cases, however, is not terminated here. The district courts in these cases relied on reasons apart from the adequacy of the state proceedings to support their decisions that *Younger* abstention was improper and, on one of these alternate grounds, we affirm their conclusions.

B. Abstention and "Our Federalism"

In *Ford*, the district court's decision not to abstain was predicated upon its view that § 641 had been preempted by federal legislation enacted to provide for the acquisition of failing savings and loans. Relying upon this Court's decision in *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Comm'n*, 791 F.2d 1111 (3d Cir. 1986) ("*Kentucky West*"), the district court held that because the supremacy clause was implicated, abstention in favor of the state proceeding was improper. See *Ford Motor Co. v. Insurance Commissioner of Pennsylvania*, 672 F. Supp. 841, 849-50 (E.D.Pa. 1987). The district court stated that "dispositive [of its decision] is a line of cases from the Courts of Appeals for the Third, Eighth, Ninth and Eleventh Circuits that hold that there can be no important state interest that the federal court should defer to in enforcing a state law that has been preempted by federal law." *Id.* at 849.¹⁰

¹⁰ We note that an alternative argument against abstention, which is not addressed by the district court, is raised in *Ford* concerning the fact that private individuals—and not the state—initiated the proceedings at issue. This Court has noted that the state's interests in adjudication of a controversy is entitled to less deference in the abstention inquiry where the proceeding was not begun by the state. See *Johnson v. Kelly*, 583 F.2d 1242, 1249 (3d Cir. 1978) (abstention improper in a challenge of tax sales of property when state action to quiet title was brought by private

In this case, as in *Kentucky West*, we note that there is no absolute rule prohibiting the application of *Younger* abstention doctrine whenever the Supremacy Clause is invoked. See *Kentucky West*, 791 F.2d at 1117 (“[i]t would . . . be an overstatement to suggest that *Younger* abstention is never appropriate when the question presented is one of preemption.”) The presence of a claim of preemption in such cases, however, requires review of the state interest to be served by abstention, in tandem with the federal interest that is asserted to have usurped the state law. In performing that inquiry, this Court and other appellate courts have “concluded that the notion of ‘comity’ embodied by the *Younger* doctrine is ‘not strained when a federal court cuts off state proceedings that entrench upon the federal domain.’” *Id.* (quoting *Middle South Energy, Inc. v. Arkansas Public Service Comm’n*, 772 F.2d 404, 417 (8th Cir. 1985), cert. denied, 474 U.S. 1102, 106 S.Ct. 884, 88 L.Ed.2d 919 (1986)). Cf. *Champion Int’l Corp. v. Brown*, 731 F.2d 1406, 1409 (9th Cir. 1984) (“Montana has no cognizable state interest in enforcing those age discrimination laws that are preempted by federal law”). In the present cases, we see no beneficial purpose, as contemplated by the *Younger*

citizens). This Court has also previously concluded that “where the pending state proceeding is a privately initiated one, the state’s interest in that proceeding is not strong enough to merit *Younger* abstention, for it is no greater than its interest in any other litigation that takes place in its courts.” *Williams*, 662 F.2d at 1019. These decisions are intended to exclude cases that are initiated for the adjudication of essentially private controversies from the purview of *Younger* abstention. They are distinguishable from the present cases in which the state’s interest in its proceeding is readily apparent. Despite their initiation by a private complainant, the proceedings at issue necessarily involve the Insurance Commissioner and are conducted by the state commission which enforces the insurance statute. Moreover, as we stated above, we recognize the state’s significant interest in the regulation of its insurance industry, and we reiterate our conclusion in *Williams* that “*Younger* commands respect for important state interests, not technicalities of form.” *Id.*

doctrine, that would be served by the district court's abstention in favor of Pennsylvania's enforcement of § 641. Although Pennsylvania's interest in the regulation of its insurance industry is significant, there exists a countervailing significant federal interest in insuring the unhindered enforcement of federal law. Balancing these interests in the present cases, we are persuaded that the scales weigh decidedly in favor of federal intervention so that the federal courts could determine the extent to which § 641 had been preempted.

As a preface to our holding on this issue, we note our view that the intent of § 641 is not ambiguous. That section was designed clearly to proscribe affiliations between all state licensed insurance companies and *any* savings and loans institutions. Accordingly, no detailed factual proceedings are necessary to determine the statute's applicability to Pennsylvania licensed insurance companies that purchase savings and loan institutions pursuant to § 1730a. See *Wisconsin v. Constantineau*, 400 U.S. 433, 439, 91 S.Ct. 507, 511, 27 L.Ed.2d 515 (1971) ("[w]here there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim"); cf. *Aluminum Co. of America v. Utilities Comm'n of North Carolina*, 713 F.2d 1024, 1030 (4th Cir. 1983) (abstention is inappropriate where conflict between challenged state action and federal law is "readily discernible from the pleadings") *cert. denied*, 465 U.S. 1052, 104 S.Ct. 1326, 79 L.Ed.2d 722 (1984). Moreover, on the records of these cases, we can discern no construction of the state statute that would limit its application such that review of the federal constitutional claims would be unnecessary.¹¹ In cases in-

¹¹ USAA reasserts on this appeal its contention that it is not subject to the prohibitions of § 641, even if the constitutionality of that statute is upheld, because it's banking affiliate "neither accepts deposits nor lends money in Pennsylvania and[,] therefore[,] is not a 'lending institution' within the meaning of the statute." Appellee/Cross-Appellant (USAA) Brief at 19 (emphasis in orig-

volving a facial challenge to a statute, the pivotal question in determining whether abstention is appropriate is whether the statute is 'fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question.' " *City of Houston, Texas v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 2513, 96 L.Ed.2d 398 (1987) (quoting *Harman v. Forssenius*, 380 U.S. 528, 534-35, 85 S.Ct. 1177, 1181-82, 14 L.Ed.2d 50 (1965)) (other citations omitted). When the possibility for such an interpretation is not apparent, however, the district court's decision to exercise its jurisdiction does not constitute error. Moreover, where the core of the controversy itself is the federal constitutional claims, and the state proceedings are initiated for *enforcement* rather than *interpretation* of the state statute, we do not conclude that the exercise of federal jurisdiction is intrusive.

In our view, the principles of comity and federalism upon which the *Younger* doctrine is predicated, are not undermined by federal intervention in these cases, which would forestall the state proceedings in order to determine whether enforcement of the state statute conflicts with an important federal scheme. Cf. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 1526, 95 L.Ed.2d 1 (1987) (*Younger* abstention warranted when "civil proceedings are pending, if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government.") (emphasis added). Federal intervention in these cases does not intrude upon

inal). The district court's decision on remand from *USAA I* does not address this contention and, on this record, it is not apparent that the appellee continued to pursue this claim in the district court. We cannot conclude that the issue, which requires factual inquiry as well as the interpretation and application of Pennsylvania state law, is properly before us. Accordingly, we do not reach this issue. We will remand this question to the district court, however, to determine the viability of this claim and, if viable, for initial decision on the merits.

the principles of our federalism given the nature of the state proceedings at issue and the significance of the federal claims asserted. Accordingly, we conclude in both of the present cases, that the challenge to § 641 on the grounds that is preempted, together with the significant federal interest that is implicated, counsel in favor of the district courts' decisions not to abstain.¹² We will, therefore, affirm the decisions of the district courts not to abstain.¹³

¹² Our conclusion that *Younger* abstention was not warranted in these circumstances applies to each case, despite our holding, that the preemption claim prevails only with regard to one of the transactions in one of the cases. See *infra*, § III. Our holding regarding *Younger* is predicated upon the significance of the federal interest invoked in these cases and our determination that the principles of comity and federalism are not undermined by the intervention of the federal court into the state proceedings in these cases. The determination of whether abstention is proper where preemption is alleged does not rest upon whether the preemption claim will ultimately prevail. Accordingly, just as the presence of a claim of preemption will not preclude abstention in every case, the decision that abstention is improper in light of a claim of preemption that has been asserted, need not result in the finding that the state statute has in fact been preempted.

¹³ Although we have concluded that the district court's decision not to abstain in *USAA* was appropriate, we are compelled to address the rationale upon which the district court relied. On remand from our decision in *USAA I* the district court recognized that *Dayton Schools* overruled our decision with regard to the adequacy of the Pennsylvania proceedings, see *USAA v. Foster*, 680 F.Supp. 712, 175 (M.D.Pa. 1987). The district court declined to abstain, however, based on its interpretation of this Court's decision in *Sullivan v. City of Pittsburgh*, 811 F.2d 171 (3d Cir.) *cert. denied*, — U.S. —, 108 S.Ct. 148, 98 L.Ed.2d 104 (1987). The district court determined that in *Sullivan* this Court added a separate "irreparable harm" factor to the inquiry of when *Younger* abstention is proper. Accordingly, the district court concluded that prior to invoking *Younger* abstention it had to ascertain whether abstention would result in irreparable harm to *USAA* and, on that point, the district court held that it was bound by the decision of

III. Preemption

Both Ford and USAA contend that § 641 has been completely displaced by federal legislation and is there-

this Court in *USAA I* concerning the affect that abstention would have upon USAA. It held that "[i]n [*USAA I*], the Third Circuit decided that USAA would suffer irreparable harm if we were to abstain." *USAA*, 680 F.Supp. at 715.

The district court's interpretation of *Sullivan* was in error. *Sullivan* did not create a new criterion to be evaluated in the *Younger* analysis, but rather interpreted—in light of the specific circumstances of the case under review—a factor that has always been an appropriate part of that inquiry. In *Younger* and in its companion cases, the Supreme Court affirmed a long standing judicial policy that deference to a state action is improper where "extraordinary circumstances [exist] in which . . . irreparable injury" to the litigant's ability to vindicate the constitutional claim is demonstrated. *Younger*, 401 U.S. at 55, 91 S.Ct. at 755. See also, *Samuels v. Mackell*, 401 U.S. 66, 69, 91 S.Ct. 764, 766, 27 L.Ed.2d 688 (1971) ("in the *Younger* case, we set out in detail the historical and practical basis for the settled doctrine of equity that a federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal suit except in very unusual situations, where necessary to prevent immediate irreparable injury."). In *Sullivan*, we noted that "the nature of the term 'irreparable harm' makes it difficult to define every situation the term encompasses". *Sullivan*, 811 F.2d at 178 (citing *Trainor v. Hernandez*, 431 U.S. 434, 442 n. 7, 97 S.Ct. 1911, 1917 n. 7, 52 L.Ed.2d 486 (1977)). We also noted the Supreme Court's instruction that "circumstances are extraordinary in the relevant *Younger* sense where they create 'an extraordinary pressing need for immediate federal equitable relief'" *Sullivan*, 811 F.2d at 179 (quoting *Kugler*, 421 U.S. at 124-25, 95 S.Ct. at 1530-31). See also *Wooley*, 430 U.S. at 712, 97 S.Ct. at 1434 (extraordinary circumstances, in terms of *Younger*, exist where "'an injunction is necessary in order to afford adequate protection of constitutional rights.'") (quoting *Spielman Motor Co. v. Dodge*, 295 U.S. 89, 95, 55 S.Ct. 678, 680, 79 L.Ed. 1322 (1935)). We reiterate here that this exception is intended to be applied with careful scrutiny and only to the extraordinary case.

In *Sullivan*, we concluded that extraordinary circumstances were present that warranted immediate federal court intervention. That case concerned recovering alcoholics who sought declaratory and injunctive relief—predicated upon claims of constitutional depriva-

fore invalid under the Supremacy Clause of the Constitution. See U.S. Const. art VI, cl. 2.¹⁴ They argue that Congress has preempted the field of regulation regarding savings and loan institutions and, thus, that § 641 has been superceded by the federal scheme. To the extent that § 641 applies to the acquisition of failing thrifts we are convinced that it has been preempted by federal law. We are unpersuaded, however, as were the district courts,

tion—from the city of Pittsburgh's decision to close alcoholic treatment centers. The district court had made a factual finding that "if recovering alcoholics at the Center were improperly forced from the center and into a community which cannot provide treatment for their abuse, these alcoholics" might suffer severe injury or death as a result. *Sullivan*, 811 F.2d at 180. We determined that this factual finding was not in error and held that "the threat of this type of injury is precisely what the irreparable harm exception to *Younger* is intended to prevent." *Id.* Specifically, we noted that

[a] wrongful deprivation by the City of Pittsburgh in this case would threaten not only to do harm to appellees' present enjoyment of rights to Equal Protection, Due Process and equal treatment under the Rehabilitation Act of 1973, but to eliminate the possibility of appellees' enjoyment or exercise of any federal constitutional or statutory rights in the future.

Id. (emphasis added). In the present cases, on the records before us, we cannot say with certainty that the same potential for irreparable injury to the appellees' right to vindicate their federal claims exist, and thus that "extraordinary circumstances" are present that compel immediate federal intervention. Accordingly, we will not affirm the district court's rationale in *USAA* that irreparable harm mandated disregard for *Younger*. In light of our holding that abstention was nonetheless proper, however, we will uphold the district court's judgment.

¹⁴ In pertinent part, that provision states that the "Constitution, and the Laws of the United States which shall be made in Pursuant thereof . . . shall be the supreme Law of the Land . . ." U.S. Const. Art. VI cl. 2. See also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211, 6 L.Ed. 23 (1824) ("to such acts of the State Legislatures as do not transcend their powers, but . . . interfere with, or are contrary to the law of Congress, made in pursuance of the constitution, . . . [i]n every such case, the act of Congress . . . is supreme; and the law of the State . . . must yield to it.")

that Congress intended to preempt entirely the states' authority to impose regulations upon savings and loan institutions that operate within the state's borders, or, as in the present case, to impose regulations upon other financial institutions that seek affiliations with savings and loans.

In reaching this conclusion, we are guided by the Supreme Court's instruction that preemption analysis should be "tempered by the conviction that the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'" *Merrill Lynch v. Ware*, 414 U.S. 117, 127, 94 S.Ct. 383, 389, 38 L.Ed.2d 348 (1973). Cf. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 *reh. denied*, 374 U.S. 858, 83 S.Ct. 1861, 10 L.Ed.2d 1082 (1963) ("federal regulation of a field of commerce should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained"). In light of this presumption in favor of the validity of state regulation, and because there is no clear indication that federal legislation is intended exclusively to provide for every aspect of the regulation of savings and loan institutions, we conclude that, apart from its application to savings and loan companies acquired pursuant to § 1730a(m), § 641's proscription of affiliations between insurance companies and savings and loan institutions has not been preempted.

A. Section 641 is Pre-empted Regarding the Acquisition of Failing Thrifts

"The question [of] whether the regulation of an entire field has been reserved by the Federal Government is, essentially, a question of ascertaining the intent underlying the federal scheme." *Hillsborough County v. Auto-*

mated Medical Laboratories, Inc., 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947); *California Savings and Loan Ass'n v. Guerra*, 479 U.S. 272, 281, 107 S.Ct. 683, 689, 93 L.Ed.2d 613 (1987) (“[i]n determining whether a state statute is pre-empted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our sole task is to ascertain the intent of Congress.”) Significantly, we note that Congress may decide not to displace state law entirely and, consequently, “may . . . preempt state law to the extent that the state law actually conflicts with federal law. Such a conflict arises when compliance with both state and federal law is impossible.” *Michigan Canners & Freezers Ass’n, Inc. v. Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461, 469, 104 S.Ct. 2518, 2523, 81 L.Ed.2d 399 (1984) (citing *Florida Lime & Avocado Growers v. Paul*, 373 U.S. at 142-43, 83 S.Ct. at 1217-18). A conflict arises also where the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed.2d 581 (1941); see also *Hillsborough County*, 471 U.S. at 713, 105 S.Ct. at 2375.

In the present cases, we have no difficulty discerning Congress’ intent from the language and legislative history of § 1730a(m) which, in our view, clearly provides that § 641 is preempted to the extent that it applies to Ford’s acquisition of failing savings and loans.

In pertinent part, § 1730a(m) provides that “[n]otwithstanding any provisions of the laws or constitutions of any State or any provision of Federal law . . . [FSLIC] upon its determination that severe financial conditions exist which threaten the stability of a significant number of insured institutions . . . may authorize *any company* to acquire control of said insured institution.” 12 U.S.C.

§ 1730a(m) (Supp. 1987) (emphasis added). This language amply demonstrates Congress' intent to preempt *all* other legislation that might inhibit the purchase of a failing thrift by a FSLIC approved buyer. Although that language, by itself, is sufficient to support our conclusion, Congress has left an even more explicit statement of its intent. In the conference report on the reenactment of 1730a(m), Congress expressly noted that with regard to the circumstances presented by one of these cases

[e]xcept as [limited by other sections of the federal statute] section 408(m) (A) (i) preempts other provisions of Federal and State law that would have the effect of preventing a company from acquiring a failing thrift institution. *Thus, for example if a life insurance company invested in or acquired a thrift institution under section 408(m) [enacted and codified as 1730a(m)], that section would preempt any state law that would prevent the company from continuing to engage in the life insurance business because of that investment or acquisition . . .*

H.R.Rep. No. 261, 100th Cong., 1st Sess., Cong.Rec. H 6857, H 6895 (daily ed. July 31, 1987) (emphasis added), U.S. Code Cong. & Admin. News 1987, p. 489. This legislative history provides unmistakable guidance to us for the disposition of this issue. *See United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 134, 98 S.Ct. 965, 980, 55 L.Ed.2d 148 (1978) ("the legislative background of [a] reenactment is conclusive . . . [w]hen a Congress that reenacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation and this Court is bound thereby"). We hold that Congress's intent to preclude any impediment to the acquisition of failing thrifts is clear. In the present cases, therefore, we conclude that § 641 is preempted with regard to Ford's purchase of the Ohio thrifts *and* the authorized branch offices of those thrifts opened in Colorado and Pennsylvania.

We reach the latter part of this holding in light of the factual finding by the district court that an essential aspect of Ford's agreement with FSLIC to purchase the Ohio thrifts was the authorization that Ford received to open the branch offices of the thrift. *Ford*, 672 F.Supp. at 843. Specifically, the district court found that, "under the authority of 12 U.S.C. § 1730a(m), the Bank Board granted to FNB the right to open branches in Pennsylvania and [Colorado]." *Id.* The district court took note of the Bank Board finding that

"the Acquisition and Merger [of FNB and the Ohio thrifts] are of very substantial benefit to the FSLIC in a measure sufficient to constitute a compelling factor in determining to make an award of branching rights in Pennsylvania and Colorado to [FNB]"

Id. (quoting Bank Board resolution approving acquisition of Ohio thrifts) (emphasis added). The district court concluded that "FNB would not have acquired the Ohio savings and loan associations if it did not get the right to open branches in these two states in return." *Id.* We do not find that determination to be clearly erroneous. We are compelled by it, and the rationale underlying § 1730a(m), to preclude application of § 641 to the Pennsylvania or Colorado branches of the thrift. In our view, application of § 641 to these branches would frustrate the intent of the federal legislation just as would the application of the state statute directly to the purchase of the Ohio thrifts themselves. Accordingly, § 641 is preempted as to these authorized branches as well as the Ohio thrifts and enforcement by Pennsylvania of § 641 as to Ford's ownership of these thrifts is precluded.

We do not reach a similar conclusion concerning thrifts acquired or capitalized outside of the purview of § 1730a(m). The legislative intent to preempt the application of § 641 beyond cases involving the acquisition of failing

thrifths is not evident, and accordingly, as to those cases, § 641 has not been preempted.

B. Federal Regulations That Concern The Savings and Loan Industry, Although Comprehensive, Do Not Evidence Congress's Intent to Displace State Regulation Entirely and Did Not Pre-empt § 641

In these cases, USAA and Ford argue that the regulatory scheme that Congress enacted for the savings and loan industry was intended to occupy that field exclusively. They contend that the federal scheme was intended to regulate more than just the *operations* of savings and loan institutions, but also to regulate every aspect "regarding the organization, ownership, incorporation and operation of federal savings banks." Appellee (USAA) Brief at 21. *See also*, Appellee (Ford) Brief at 24 ("[section] 641 is preempted as applied . . . because it frustrates federal purposes and 'stands as an obstacle' to the broad and pervasive federal regulatory scheme governing the ownership and control of federal S & L's"). They assert that the comprehensiveness of the federal regulatory scheme, together with the significant federal interest in the regulation of savings and loan institutions, evinces congressional intent to preclude supplemental state regulation. We do not agree.

In cases such as these, where Congress has not expressly preempted a state's statute, its "intent to preempt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Hillsborough County*, 471 U.S. at 714, 105 S.Ct. at 2375. *See also Guerra*, 479 U.S. at 280, 107 S.Ct. at 689 (congressional intent to preempt may be inferred where the scheme of federal regulation is "sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementaly state regulation").

In both cases, the district courts acknowledged the comprehensiveness of the federal regulatory scheme. See *USAA*, 680 F.Supp. at 716; *Ford*, 672 F.Supp. at 846. Both district courts, however, concluded that the intent of the federal scheme was to regulate the *operation* of federally insured thrifts. Accordingly, each court concluded that the federal regulations did not preclude supplemental state regulations which, as in these cases, imposed a restriction upon the *affiliations* that the thrift could have and were designed more to regulate the insurance industry rather than to control the operation of the savings and loan industry. Our review of the federal regulatory scheme leads us to a similar conclusion.

We reiterate that our conclusion on this issue is informed by the Supreme Court's instruction that "federal regulation of a field of commerce should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained." *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. at 142, 83 S.Ct. at 1217. We are unconvinced that the federal banking regulatory scheme permits no conclusion other than that Congress intended to occupy the field exclusively.

Initially we note that the comprehensive nature of the federal regulatory scheme, by itself, is not sufficient to support a conclusion that Congress intended to preempt all state regulation. See *Hillsborough*, 471 U.S. at 717, 105 S.Ct. at 2377 ("[t]o infer preemption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive"). Indeed, precisely because the regulatory scheme at issue in these cases is so detailed, we interpret the absence of clear preemptive language as indicative that Congress did not intend to displace state law entirely. We note, as has the Supreme Court, that "be-

cause agencies normally address problems in a detailed manner and can speak through a variety of means . . . we can expect that they will make their intentions clear if they intend for their regulations to be exclusive." *Id.*

Moreover, the regulations at issue in the present cases provide explicitly for preemption of state law on two issues, *see* 12 C.F.R. § 590 (1988) ("Preemption of State Lending Restrictions) (expressly preempting state usury laws and state due on sale laws), but nowhere indicate that *all* state regulation is preempted. Indeed, in one section, the regulations clearly demonstrate Congress' recognition that the federal scheme might be supplemental by state regulation. Section 555.17(b) precludes officers or directors of savings and loan associations from referring insurance business generated by members of the S & L to insurance companies with which the officers or directors are affiliated.¹⁵ Such referrals would constitute a usurpation of the S & L's corporate opportunity to engage in the insurance business. Significantly, however, § 555.17 is limited by specific exceptions enumerated elsewhere in the section. One of those exceptions provides that

[n]o corporate opportunity for a Federal association to enter the insurance business is deemed to have existed

....

[w]hile a specific State statute or regulation precluded Federal association service corporations . . . from engaging in the insurance business

12 C.F.R. § 555.17(c) (iii) (1988) (emphasis added).

¹⁵ In pertinent part, that section provides that

referral of insurance business of an association's members to an insurance agency owned by one or more officers or directors of the association, or by one or more persons having the power to direct its management, constitutes usurpation of the association's corporate opportunity to engage in the insurance business.

12 C.F.R. § 555.17(b) (1988)

Appellees correctly assert that the circumstance provided for in § 555.17 is not at issue in these cases. In our view, however, the existence of this provision provides compelling evidence that Congress did not envision that all state regulations would be in conflict with the federal regulatory scheme. Moreover, the subject matter of § 555.17(c) (iii) is particularly significant because it demonstrates Congress's specific awareness of the existence of state statutes such as § 641. In that light, we cannot conclude that, by these regulations, "Congress 'left no room' for supplementary state regulation." *Hillsborough County*, 471 U.S. at 713, 105 S.Ct. at 2373. Accordingly, we also cannot conclude that Congress intended exclusively to occupy this field of regulation.

IV. *Dormant Commerce Clause*

Upon their conclusions that abstention was not warranted and that § 641 was not wholly preempted, the district courts reviewed Ford's and USAA's claim that § 641 was invalid as a violation of the dormant Commerce Clause. *See* U.S. Const. art. I, § 8, cl. 3.¹⁶ On that

¹⁶ In pertinent part, that clause provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several states." U.S. Const. art. 1 § 8, cl. 3.

In light of its conclusion that USAA's creation of a Bank in Texas was not preempted by federal law because it did not fall within the scope of 1730a(m), the district court granted summary judgment to USAA on the grounds that enforcement of § 641 against that insurer violated the Commerce Clause.

In *Ford*, the district court initially did not reach the merits of this constitutional issue. It's decision held only that federal law preempted application of § 641 to the acquisition of the failing Ohio S & L's and the Pennsylvania and Colorado branches. Subsequent to that decision, the Commissioner moved for amendment of the district court's order because it did not address Ford's acquisition of FNFC and FNB in 1985, which the commissioner asserted was a violation of § 641. The Commissioner contended that application of § 641 was not preempted because those institutions had not been purchased pursuant to the failed S & L provi-

claim, however, the courts concluded that to the extent that § 641 was not preempted, it was nonetheless constitutionally infirm because it imposed an excessive burden upon interstate commerce.

The courts determined that § 641's proscription of affiliations between Pennsylvania insurance companies and financial institutions—whether or not located in Pennsylvania—indirectly regulated interstate commerce. Accordingly, the district courts held that resolution of the constitutional validity of § 641 turned upon application of the Supreme Court's holding in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). In *Pike*, the Supreme Court stated that

sion of federal law. In response to that motion the district court concluded that, although § 1730a did not preempt the application of § 641 to FNFC and FNB, "enforcement of section 641 on insurance companies that own banking affiliates that do not operate in Pennsylvania is invalid as a violation of the commerce clause of the Constitution." *Ford Motor Co. v. Insurance Commissioner*, No. 87-3241 (Supplemental Memorandum) slip op. at 5, 1988 WL 29342 (E.D.Pa. Mar. 22, 1988) reprinted at Jt.App. at 148. (citing *USAA*). In reaching its conclusion, the district court relied entirely upon the rationale expressed in *USAA v. Foster*. Accordingly, our discussion of the propriety of application of the Commerce Clause to § 641 focuses upon the decision issued in *USAA* and attributes that holding to both cases. We note, however, that the decision of the district court in *USAA* striking § 641 as violative of the Commerce Clause, relied in significant part upon the fact that the insurer in that case *did not own an affiliated bank that transacted business in Pennsylvania*. See *USAA*, 680 F.Supp. at 722. That circumstance, obviously, is not true in *Ford*. The decision in *USAA*, *in dicta*, did note that in cases that involved insurers who were affiliated with Pennsylvania banks "the concerns of the Commissioner and the [Independent Agents] become very real," *Id.* at 721-22, but summarily concluded that that statute would nonetheless be invalid as overbroad. In our view, that conclusion is insufficient of itself to support the judgment in *Ford*. For that reason, even if we were to sustain the decision of the district court in *USAA*, we could not, on this record, affirm the judgment of the district court in *Ford*.

[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are not incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits

Id. at 142, 90 S.Ct. at 847.

In the present cases, the district courts concluded in light of *Pike* that, although the imposition on interstate commerce that resulted from the enforcement of § 641 is incidental, that burden is still “excessive” because the benefits to Pennsylvania are not sufficiently realized by § 641 to support the burden upon interstate commerce. For that reason, the district court struck § 641 as unconstitutional. In arriving at this balance between the significance of the state interest in precluding the affiliations between insurers and banking institutions, and the effect of that regulation upon interstate commerce, however, the district courts erred. Because that statute regulated indiscriminately—affording no preference to in-state interests over others—we cannot conclude that it presented a burden to *interstate* commerce and, in that light, we hold that it did not violate the Commerce Clause.

Indiscriminate Regulation Of Commerce Does Not Necessarily Burden “Interstate Commerce”

The Insurance Commissioner asserts that § 641 effects three important state goals: “to protect the insurance industry from . . . unfair concentration; . . . to protect consumers from coercive ‘tic-ins’ and other forms of subtle pressure tactics by lending institutions; and . . . to protect the ability of the insurance examiners to monitor adequately the insurance industry.” *USAA*, 680 F. Supp. at 720. The district courts did not question the legitimacy of these goals, but concluded that “the adverse effects of affiliation are not present where the affiliated

bank is outside the jurisdiction, or are readily prevented in ways less burdensome than is prescribed in Section 641(b).” *Id.*

Resolution of the issue of applicability of the Commerce Clause to these cases is dependent upon the level of scrutiny that is applied to review the Pennsylvania statute. As we have previously noted, three standards of review are applied in performing dormant Commerce Clause inquiry:

1) state actions that purposefully or arbitrarily discriminate against interstate commerce or undermine uniformity in areas of particular federal importance are given heightened scrutiny; 2) legislation in areas of peculiarly strong state interest is subject to very deferential review; and 3) the remaining cases are governed by a balancing rule, under which state law is invalid only if the incidental burden on interstate commerce is clearly excessive in relation to the putative local benefits.

Norfolk Southern Corp. v. Oberly, 822 F.2d 388, 398-99 (3d Cir. 1987). Under the highest level of scrutiny “the burden falls upon the State to demonstrate both that the statute ‘serves a legitimate local purpose,’ and that this purpose could not be served as well by available non-discriminatory means.” *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 2448, 91 L.Ed.2d 110 (1986) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336, 99 S.Ct. 1727, 1736, 60 L.Ed.2d 250 (1979)). “In practice, such heightened scrutiny is applied with considerable rigor and turns out to be ‘a virtually *per se* rule of invalidity.’” *Norfolk Southern Corp.*, 822 F.2d at 400 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475 (1978)).

In the present cases, heightened scrutiny of § 641 is not warranted because that provision does not discriminate in the manner that it regulates. As we have held

"[h]eightedened scrutiny is the standard of review for 'simple economic protectionism.' . . . [this] category of protectionism includes those state measures that discriminate on their face against out-of-state interests or in favor of in-state interests." *Norfolk*, 822 F.2d at 400 (citing *Philadelphia*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978); *Hughes*; *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984)). The state statute at issue, however, is not the "simple economic protectionism" that the Commerce Clause precludes. Accordingly, because heightened scrutiny is not applicable, § 641 must be upheld if the incidental burden that it imposes upon interstate commerce is not "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S.Ct. at 847. See also, *Minnesota v. Clover Leaf Creamery, Co.*, 449 U.S. 456, 471, 101 S.Ct. 715, 727, 66 L.Ed.2d 659 *reh. denied*, 450 U.S. 1027, 101 S.Ct. 1735, 68 L.Ed.2d 222 (1981).¹⁷

As we have previously noted in performing that inquiry, "[t]he 'incidental burden on interstate commerce' appropriately considered in Commerce Clause balancing is the degree to which the state action incidentally discriminates against interstate commerce *relative to intra-state* commerce. It is a comparative measure." *Norfolk Southern*, 822 F.2d at 406 (emphasis added). In our view, "the Commerce Clause is concerned with protectionism and the need for uniformity . . . legislation will not be invalidated under the *Pike* test in the absence of *discriminatory* burdens on interstate commerce." *Id.*

The Supreme Court's decision in *Exxon Corp v. Governor of Maryland*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d

¹⁷ We do not reach the inquiry of whether § 641 is entitled to the second standard of review set forth in *Norfolk Southern*. Although Pennsylvania has a significant interest in the regulation of its insurance industry, its concern is not "peculiarly local" such that it invokes this most differential standard of review.

91, reh. denied sub nom., *Shell Oil Co. v. Governor of Maryland*, 439 U.S. 884, 99 S.Ct. 232, 58 L.Ed.2d 200 (1978), provides useful instruction. In *Exxon*, the Court addressed a Maryland statute that precluded companies that refined petroleum from owning retail service stations within Maryland. The proscription applied to in-state owners of oil refineries as well as to out of state refineries, and because no competitive advantage to local interest was discernible, the court upheld the constitutionality of the statute. In reaching its conclusion, the Court noted that the state act "create[d] no barriers whatsoever against interstate independent dealers; it [did] not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market." *Exxon*, 437 U.S. at 126, 98 S.Ct. at 2214. The Court concluded that "the absence of any of these factors *fully distinguishes this case from those in which a State has been found to have discriminated against interstate commerce.*" *Id.* (emphasis added). It held that

[w]hile the refiners will no longer enjoy their same status in the Maryland market, in-state independent dealers will have no competitive advantage over out-of-state dealers. *The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.*

437 U.S. at 126, 98 S.Ct. at 2214 (emphasis added). See also *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88, 107 S.Ct. 1637, 1649, 95 L.Ed.2d 67 (1987) ("[b]ecause nothing in the Indiana Act imposes a greater burden on out-of-state [entities] than it does on similarly situated Indiana [entities], we rejected the contention that the Act discriminates against interstate commerce").

This Court has similarly concluded that

[w]here the "burden" on out-of-state interests is no different from that placed on competing in-state in-

terests . . . it is a burden on *commerce* rather than a burden on *interstate commerce*. In such cases, nothing in Commerce Clause jurisprudence entitles out-of-state interests to more strict judicial review than that to which the in-state interests are entitled.

Norfolk Southern, 822 F.2d at 406 (emphasis in original). We are persuaded that this same conclusion is applicable to the present cases. Section 641 places no discriminatory burdens on interstate insurers. It does not add increased costs to them or otherwise distinguish between in-state insurers and out-of-state insurers in the insurance market. Indeed, as the district court in *USAA* found, *USAA* "could not make . . . [the] argument [that § 641 discriminates against interstate commerce in favor of local business because] Section 641(b) treats all insurance companies and all savings and loans alike, *whether or not they are based in Pennsylvania*." See *USAA*, 680 F.Supp. at 719 n. 6. For these reasons, we conclude that the Commerce Clause has not been violated.¹⁸

¹⁸ Our holding in these cases is consonant with the Supreme Court's guidance in this area. The Court has previously noted that where regulations "affect alike shippers in interstate and intrastate commerce in large numbers within as well as without[,] the state is a safeguard against their abuse." *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 187, 58 S.Ct. 510, 515, 82 L.Ed. 734 (1938). That holding endorses the rationale that the state's regulatory scheme will be adequately monitored because an instate constituency is similarly affected, and will act in its interests to keep the legislature from overreaching. See also, *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 783, 65 S.Ct. 1515, 1527, 89 L.Ed. 1915 (1945); L. Tribe, *American Constitutional Law* at 409-10 & nn. 4-8 (2d ed. 1988).

One possible source of this rationale is the famous "footnote 4" of *Carolene Products*. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 783 n. 4, 82 L.Ed. 1234 (1938). Consistent with the overall view of that case, the court articulated a view that one commentator has described in the following manner:

[w]hen states adopt economic regulations that affect out-of-state interests, those out-of-state interests are likely to be short-

The district courts, in reaching the conclusions that the Commerce Clause invalidates § 641, appear to have been most persuaded by the significant economic effect that enforcement of § 641 will have upon Ford and USAA. Indeed, the district court in *USAA* concluded that “[i]f the Insurance Department enforces Section 641(b) against USAA, USAA will be forced to abandon its insurance business in Pennsylvania or relinquish its interest in the Texas bank. If USAA opts to allow its insurance license to be revoked, this revocation could re-

changed because they are not represented in the political process that produces the regulations. But everyone who is affected ought to be represented. Therefore we have judicial review of state economic regulation that affects out-of-state interests in order to give those interests “virtual representation.”

Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich.L.Rev. 1091, 1160 (1986). The value of this analytical approach is debated. Compare *id.* (asserting that implicit in such an approach is the reliance upon state and federal interests, and arguing that such an approach should be replaced by inquiry of the state legislature’s motivation) with Tushnet, *Rethinking the Dormant Commerce Clause*, 79 Wis. L.Rev. 125 (1979) (discussing a political theory of judicial review in dormant commerce clause cases in which the focus of concern is the adequacy of the legislature to protect important interests). This rationale however, is firmly entrenched in our jurisprudence, see, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n. 17, 101 S.Ct. 715, 728 n. 17, 66 L.Ed.2d 659 *reh. denied*, 450 U.S. 1027, 101 S.Ct. 1735, 68 L.Ed.2d 222 (1981) (“[t]he existence of major in-state interests adversely affected by the [state statute] is a powerful safeguard against legislative abuse); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 n. 18, 98 S.Ct. 787, 795 n.18, 54 L.Ed.2d 664 (1978) (“The Court’s special deference to state highway regulations derives in part from the assumption that where such regulations do not discriminate on their face against interstate commerce, their burden usually falls on local economic interests as well as other states’ economic interests, thus insuring that a state’s own political processes will serve as a check against unduly burdensome regulations”), and persuades us in the present cases, that the protections afforded by the Commerce Clause are not implicated.

sult in devastating economic consequences.” *USAA*, 680 F.Supp. at 721. On this point, the district court quoted this Court’s opinion in *USAA I* in which we concluded, in our holding that *Pullman* abstention was inappropriate, that *USAA* would suffer “devastating economic consequences” if its license to sell insurance in Pennsylvania was revoked. *See id.* (quoting *USAA I*, 792 F.2d at 363).

We are not unaware, nor are we insensitive to this “burden” that results from the enforcement of the state provision. We cannot say, however, that the dormant Commerce Clause is the proper remedy. Both Ford and *USAA* appear to have adopted corporate strategies that seek to expand their corporate bases by the acquisition of other companies. That strategy is their own choosing and we express no value judgments concerning it. In making those choices, however, the companies must expect that they will be required to comply with all applicable state as well as federal regulations. They cannot hope to invoke the Constitution at every turn to circumvent state regulation and insure unrestricted expansion and protection of their opportunity to obtain the greatest margin of profit.

On this point we are again guided by *Exxon*. In that case, the Supreme Court noted arguments that, as the result of the state divestiture regulation, some oil refiners would stop selling in Maryland. *See Exxon*, 437 U.S. at 127, 98 S.Ct. at 2215. The Court also recognized that the result of that occurrence might be that Maryland consumers would be deprived of some special services that had previously been provided by the affiliated retail stations. *Id.* Although it assumed, *arguendo*, the accuracy of these contentions, the Court nonetheless concluded that the protections of the Commerce Clause, had not been triggered. Significantly, it concluded that even if those refiners chose to withdraw entirely from the Maryland market “there [was] no reason to assume that their share of the entire supply [would] not be promptly replaced by

other *interstate* refiners . . interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another." *Exxon*, 437 U.S. at 127, 98 S.Ct. at 2215. Similarly, in the present cases, the district courts, holdings give us no reason to conclude that *interstate commerce* will be adversely affected by enforcement of § 641. There is no reason for us to assume that USAA's or Ford's share of the insurance products sold in Pennsylvania will not be promptly replaced by other interstate insurers. Accordingly, we cannot conclude that § 641 places an impermissible burden upon interstate commerce.

The district courts distinguish *Exxon* on the grounds that the statute at issue in that case "did not have the practical effect of indirectly regulating the refiners' ownership of other entities outside the state." *USAA*, 680 F.Supp. at 722. In that light, the courts concluded that "unlike [§ 641], the Maryland statute in the *Exxon* case did not reach beyond the borders of the state," *id.* and, because § 641 precluded Pennsylvania insurers from affiliations with S & L's wherever located, its affect upon interstate commerce was different from that involved in *Exxon*. We believe that this narrow reading of *Exxon* is in error.

We do not view the Court's decision in *Exxon* as predicated upon the conclusion that the state statute did not regulate beyond the Maryland borders. Indeed, we note that Justice Blackmun's dissent departs from the Court majority precisely because of the recognition that the Maryland statute had the actual effect of precluding many out-of-state businesses from participating in the retail market in Maryland. See *Exxon*, 437 U.S. at 138, 98 S.Ct. at 2220 ("[o]f the class of enterprises excluded entirely from participation in the retail gasoline market, 95% were out-of-state firms.") (Blackmun, J., concurring and dissenting). In our view, the focus of the majority

opinion was the *manner* by which the statute regulated. The Court concluded that the fact that the statute regulated *indiscriminately* compelled the conclusion that the Commerce Clause had not been violated.¹⁹

As the Supreme Court has noted, "[t]he Commerce Clause [does not] protect[] the particular structure or method of operation in a retail market . . . the Clause protects the interstate market, not the particular interstate firms, from prohibitive or burdensome regulations." *Exxon*, 437 U.S. at 127, 98 S.Ct. at 2215 (emphasis added) (citation omitted). Thus, although § 641 may provide somewhat of a boon to independent insurance agents who sell insurance in Pennsylvania, that boon is no less available to independent agents who are based outside of the state as it is to such agents for whom Pennsylvania is home. To the extent that the regulation infringes upon the commercial association rights of lending institutions outside of Pennsylvania, it infringes upon those same rights of lending institutions within Pennsylvania. In that light, even if § 641 is viewed as "protectionist" of the economic interests of unaffiliated insurers, because it does not afford that protection only to local agents, it is not violative of the Commerce Clause.²⁰

¹⁹ We are not unaware that, even a statute that is facially indiscriminate may nonetheless be determined to be violative of the Commerce Clause because it has a discriminatory effect. Nothing in the records of the present cases, or in the decisions of the district courts, however, indicates that enforcement of § 641 will have the effect of favoring in-state interests over out-of-state interests.

²⁰ Finally, USAA and Ford argue that heightened scrutiny of § 641 is proper because of the significant need for uniformity in the regulation in this area. Their argument on this point appears, essentially, to be that the prohibition of a "financially sound" institution from eligibility to be a purchaser of a S & L conflicts with the federal policy. They argue that, pursuant to *Southern Pacific*, the Commerce Clause should render the statute unconstitutional because the "federal government has a compelling interest 'in the uniformity of regulation' in connection with the ownership, acquisition and control of federally insured thrift institutions." Appellee

V. Conclusion

In light of the foregoing, we reach the following conclusions in these cases: In *Ford*, we will affirm the decision of the district court not to abstain. We will also affirm the district court's decision that § 641 was inapplicable to Ford's acquisition of the two failing Ohio S & L's under the provisions of 12 U.S.C. § 1730a(m) (1982), and the branches authorized in connection with that acquisition, because the state statute has been preempted by the federal law concerning the emergency acquisition of failing thrifts. We will also affirm the district court's conclusion that § 641 is not preempted by federal law in its application to circumstances other than those provided by § 1730a(m). We will reverse, however, the district court's judgment that § 641 is violative of the dormant Commerce Clause.

In *USAA*, we will affirm the decision of the district court not to abstain, although we will not affirm the

(Ford) Brief at 30 (quoting *Southern Pacific*, 325 U.S. at 770, 65 S.Ct. at 1521). To succeed on this argument, however, the appellees must demonstrate the presence of a national scheme to regulate completely the transfer and affiliations of every S & L throughout the country. They have failed in that demonstration and neither is the existence of such a scheme apparent on the face of the federal legislation.

In our view, the appellees' assertions on this point are merely the preemption argument dressed in different clothing. See *Rice*, 331 U.S. at 230, 67 S.Ct. at 1152 (federal preemption will be inferred where the field is one in which the federal interest is so dominant that the "federal system will be assumed to preclude enforcement of state laws on the same subject"), see also, *Hillsborough County*, 471 U.S. at 713, 2374. (sic) As we have held in this opinion *supra*, to the extent that § 641 imposes restrictions or regulations that affect the ability of an otherwise viable institution to purchase a failing thrift, it conflicts with federal legislation, and, therefore, is preempted. Apart from that circumstance, however, we do not discern a conflict between the state statute and federal regulation of the savings and loan industry that requires invalidation of the state statute.

rationale upon which it relied. We will also affirm the holding of the district court that § 641 is not preempted by federal law in its application to USAA's establishment of a Texas savings and loan company. We will reverse, however, the district court's judgment that § 641 is violative of the dormant commerce clause and we will remand this matter to the district court for its determination of the viability of USAA's claim that the state statute is otherwise inapplicable to it. *See supra*, n. 11.

All parties in these cases will bear their own costs.

APPENDIX B _

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-5077, 88-5078 & 88-5121

UNITED SERVICES AUTOMOBILE ASSOCIATION,
a Texas Reciprocal Interinsurance Exchange

and

USAA CASUALTY INSURANCE COMPANY,
a Texas Stock Insurance Company,

and

USAA LIFE INSURANCE COMPANY,
a Texas Stock Insurance Company,

and

USAA ANNUITY AND LIFE INSURANCE COMPANY,
a Texas Stock Insurance

v.

MUIR, WILLIAM J., III,
Acting Insurance Commissioner of the
Commonwealth of Pennsylvania

PENNSYLVANIA ASSOCIATION OF INDEPENDENT INSURANCE
AGENTS; JOHN ULRICH, JR.; PROFESSIONAL INSURANCE
AGENTS ASSOCIATION OF PENNSYLVANIA, MARYLAND
AND DELAWARE, INC.; CHARLES P. LEACH, JR.; PENN-
SYLVANIA ASSOCIATION OF LIFE UNDERWRITERS; and
HAROLD E. ALEXANDER,

Appellants in 88-5077

UNITED SERVICES AUTOMOBILE ASSOCIATION,
a Texas Reciprocal Interinsurance Exchange

and

USAA CASUALTY INSURANCE COMPANY,
a Texas Stock Insurance Company,

and

USAA LIFE INSURANCE COMPANY,
a Texas Stock Insurance Company,

and

USAA ANNUITY AND LIFE INSURANCE COMPANY,
a Texas Stock Insurance

v.

MUIR, WILLIAM J., III,
Acting Insurance Commissioner of the
Commonwealth of Pennsylvania

PENNSYLVANIA ASSOCIATION OF INDEPENDENT INSURANCE
AGENTS; JOHN ULRICH, JR.; PROFESSIONAL INSURANCE
AGENTS ASSOCIATION OF PENNSYLVANIA, MARYLAND
AND DELAWARE, INC.; CHARLES P. LEACH, JR.; PENN-
SYLVANIA ASSOCIATION OF LIFE UNDERWRITERS; and
HAROLD E. ALEXANDER,

CONSTANCE FOSTER,

Appellant in 88-5078

UNITED SERVICES AUTOMOBILE ASSOCIATION,
a Texas Reciprocal Interinsurance Exchange

and

USAA CASUALTY INSURANCE COMPANY,
a Texas Stock Insurance Company

and

USAA LIFE INSURANCE COMPANY,
a Texas Stock Insurance Company

and

USAA ANNUITY AND LIFE INSURANCE COMPANY,
a Texas Stock Insurance

v.

MUIR, WILLIAM J., III,
Acting Insurance Commissioner of the
Commonwealth of Pennsylvania

PENNSYLVANIA ASSOCIATION OF INDEPENDENT INSURANCE
AGENTS; JOHN ULRICH, JR.; PROFESSIONAL INSURANCE
AGENTS ASSOCIATION OF PENNSYLVANIA, MARYLAND
AND DELAWARE, INC.; CHARLES P. LEACH, JR.; PENN-
SYLVANIA ASSOCIATION OF LIFE UNDERWRITERS; and
HAROLD E. ALEXANDER,

UNITED SERVICES AUTOMOBILE ASSOCIATION,
USAA CASUALTY INSURANCE COMPANY,
USAA LIFE INSURANCE COMPANY, and
USAA ANNUITY AND LIFE INSURANCE COMPANY,
Appellants in 88-5121

On Appeal from the United States District Court for the
Middle District of Pennsylvania
(D.C. Civil Action No. 84-1596)

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, SEITZ,
HIGGINBOTHAM, SLOVITER, BECKER,
STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN,
and NYGAARD, *Circuit Judges*.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/ Leon Higginbotham
Circuit Judge

Dated: June 9, 1989

APPENDIX C

UNITED STATES DISTRICT COURT
M.D. PENNSYLVANIA

Civ. No. 84-1596

UNITED SERVICES AUTOMOBILE ASSOCIATION, *et al.*,
Plaintiffs,

v.

CONSTANCE FOSTER,
Defendant.

Dec. 23, 1987

Michael L. Browne, Christopher K. Walters, Reed, Smith, Shaw & McClay, Philadelphia, Pa., Robert B. Hoffman, Reed, Smith, Shaw & McClay, Harrisburg, Pa., for plaintiffs.

Andrew S. Gordon, Ellis M. Saull, Dist. Attys. Gen., Allen C. Warshaw, Sr. Deputy Atty. Gen., Office of Atty. Gen., Harrisburg, Pa., for defendant.

Karen Balaban, William Balaban, Harrisburg, Pa., for intervenors.

MEMORANDUM

HEPMAN, District Judge.

In this action against the Insurance Commissioner of the Commonwealth of Pennsylvania (hereinafter "Commissioner"), the plaintiffs, United Services Automobile Association, U.S.A.A. Casualty Insurance Company, U.S.A.A. Life Insurance Company, and U.S.A.A. Annuity and Life Insurance Company (hereinafter "USAA") challenge the constitutionality of Section 641 of Penn-

sylvania's Insurance Department Act of 1921, 40 Pa. C.S.A. § 281.¹ Presently before us are three motions: the motion of the Commissioner for summary judgment on abstention grounds; the motion of USAA for summary judgment on pre-emption grounds; and the motion of USAA for summary judgment on Commerce Clause grounds.

I. BACKGROUND

USAA, a reciprocal interinsurance exchange organized and existing under the laws of Texas with its principal place of business in San Antonio, is licensed to sell insurance in Pennsylvania. In April, 1984, USAA Financial Services, a wholly-owned subsidiary of USAA, filed an application with the Federal Home Loan Bank Board for a Federal Savings Bank Charter for the USAA Federal Savings Bank. The bank received its charter and began operations in San Antonio in December, 1983. The bank has no locations in Pennsylvania.

In July and August, 1984, the Pennsylvania Insurance Department notified USAA that its indirect ownership of the bank in Texas constituted a violation of Section 641 of the Insurance Department Act and advised USAA that it must divest itself of the bank or risk revocation of its licenses to transact insurance business in Pennsylvania. In November, 1984, USAA brought the present action under 42 U.S.C. § 1983, seeking declaratory and

¹ Section 641, in pertinent part, provides:

(b) No lending institution, public utility, bank holding company, savings and loan holding company or any subsidiary or affiliate of the foregoing, or officer or employe thereof, may, directly or indirectly, be licensed or admitted as an insurer or be licensed to sell insurance in this State either as a broker or as an agent except that a lending institution or bank holding company, subsidiary or affiliate of a lending institution may be licensed to sell credit life, health and accident insurance and to sell and underwrite title insurance in accordance with regulations promulgated by the Insurance Commissioner.

injunctive relief against the Commissioner, and, in December, 1984, the Commissioner initiated state agency proceedings to revoke the plaintiffs' insurance licenses.

After consideration of the motion of the Commissioner to dismiss the federal action on abstention grounds, we ordered the action dismissed on September 30, 1985. USAA appealed from our order.

In June, 1986, the Court of Appeals for the Third Circuit reversed the judgment and remanded the case for further proceedings consistent with its opinion. See *United Services Automobile Association v. Muir*, 792 F.2d 356 (3d Cir. 1986). Thereafter, we issued a preliminary injunction which prohibits the Commissioner from revoking the plaintiffs' insurance licenses pending further order.

In October, 1986, the Commissioner filed a Petition for a Writ of Certiorari in the Supreme Court. The Supreme Court denied the petition.

On August 21, 1987, we granted the motion of the Pennsylvania Association of Independent Insurance Agents, John M. Ulrich, Jr., Professional Insurance Agents Association of Pennsylvania, Maryland and Delaware, Inc., Charles P. Leach, Jr., Pennsylvania Association of Life Underwriters and Harold E. Alexander, to intervene in the action. Oral argument on the motions for summary judgment was held September 16, 1987.

II. ABSTENTION

In our September, 1986, ruling in this case, we dismissed USAA's complaint on abstention grounds. We relied on the three different types of abstention set forth in *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943); and *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). The Court of Appeals for

the Third Circuit reversed our ruling and held that none of the three types of abstention applied. *USAA v. Muir*, 792 F.2d 356. On remand, the Insurance Commissioner has again moved for abstention based solely on the *Younger* abstention. For the following reasons, we shall deny the motion.

The Commissioner has renewed the motion for summary judgment on abstention grounds basing his argument on the holding in the recent Supreme Court case of *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986). In *Dayton*, the Supreme Court held that *Younger* abstention applies "to state administrative proceedings in which important state interests are vindicated, so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim." *Id.* at 627, 106 S.Ct. at 2723, 91 L.Ed.2d at 522. The Court further ruled that even if the state administrative agency could not itself consider the constitutionality of a state statute it is called upon to enforce, "it would seem an unusual doctrine . . . to say that [the agency] could not construe its own statutory mandate in the light of federal constitutional principles. . . . In any event, it is sufficient . . . that constitutional claims may be raised in state court judicial review of the administrative proceeding." *Id.* at 629, 106 S.Ct. at 2724, 91 L.Ed.2d at 523.

Although we agree with the Commissioner that the holding of the Supreme Court in *Dayton* appears to overrule the Third Circuit's holding in *USAA v. Muir* on the issue of *Younger* abstention, the Third Circuit's latest decision involving *Younger* abstention, *Sullivan v. City of Pittsburgh*, 811 F.2d 171 (3d Cir. 1987), requires us to reject the Commissioner's motion for summary judgment. In addition to the requirement under the *Younger* abstention doctrine that there be an ongoing state proceeding in which constitutional claims can be raised, the

Third Circuit in *Sullivan* added the requirement that, in order to invoke *Younger* abstention, irreparable injury may not be threatened.²

In *USAA v. Muir*, the Third Circuit decided that USAA would suffer irreparable harm if we were to abstain.³ Therefore, on the issue of abstention, we are bound by the Third Circuit's prior opinion in this case. If the Third Circuit in *Sullivan* had not added the requirement of no threat of irreparable harm to the *Younger* abstention doctrine, we would have leaned toward granting the Commissioner's renewed motion for summary judgment on abstention grounds. However, because of the *Sullivan* opinion, we are clearly bound

² The court in *Sullivan* stated:

Since *Younger*, the Court has recognized that extraordinary circumstances may threaten irreparable injury which justifies federal intervention in ongoing state proceedings even in the absence of bad faith or harassment by state officials. Although the Court has acknowledged that the nature of the term 'irreparable harm' makes it difficult to define every situation the term encompasses, the Court has stated that circumstances are extraordinary in the relevant *Younger* sense where they create 'an extraordinarily pressing need for immediate federal equitable relief,' and do not simply present a unique or unusual factual situation. Such need for relief appears justified upon a showing "that an injunction is necessary in order to afford adequate protection of constitutional rights."

Sullivan, 811 F.2d at 179 (citations omitted).

³ The Third Circuit held:

Weighing the legal issues and the devastating economic consequences a license revocation would impose upon USAA on the one hand and the vague claim of risks to the state from a Texas bank not doing business in Pennsylvania on the other hand, we conclude that the district court erred by holding that the state appeal and supersedeas procedures adequately protected USAA's interests.

USAA v. Muir, 792 F.2d at 363.

by the Third Circuit's decision in *USAA v. Muir* under the law-of-the-case doctrine.⁴

III. PRE-EMPTION

USAA has moved for summary judgment on pre-emption grounds, arguing that Section 641(b) as applied to USAA is invalid under the Supremacy Clause of the United States Constitution. Specifically, USAA claims that Section 641(b) is preempted by the Home Owners' Loan Act of 1933 ("HOLA"), 12 U.S.C. § 1461 *et seq.*, the National Housing Act, 12 U.S.C. §§ 1730, 1730a, and the regulations promulgated pursuant to these acts. USAA offers two reasons to support its claim of pre-emption: (1) Congress has occupied the entire field regarding the organization, ownership, incorporation and operation of federal savings banks; and (2) Section 641 is in actual conflict with federal law, standing as an obstacle to the full accomplishment of the federal government's purposes in that the federal government, through the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation, approved USAA's ownership of the savings bank in Texas.

Pre-emption of a state law by a federal law or regulation has its roots in the Supremacy Clause which provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . .

⁴ The law-of-the-case doctrine applies to issues that were discussed by the court in a prior appeal. *Schultz v. Onan Corp.*, 737 F.2d 339, 345 (3d Cir. 1984). Generally, a court will refuse to reopen what has already been decided. *Zichy v. City of Philadelphia*, 590 F.2d 503, 508 (3d Cir. 1979). The court, however, has the duty to apply "a supervening rule of law despite its prior decisions to the contrary when the new legal rule is valid and applicable to the issues of the case." *Id.* Based on this duty to apply a supervening rule of law, we would have considered the defendant's renewed motion based on the Supreme Court's ruling in *Dayton* had the *Sullivan* decision not explained the Third Circuit's stance on the irreparable harm requirement.

shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. It is well-settled that pre-emption may occur in any of the following three ways:

First, in enacting the federal law, Congress may explicitly define the extent to which it intends to pre-empt state law. Second, even in the absence of express pre-emptive language, Congress may indicate an intent to occupy an entire field of regulation, in which case the States must leave all regulatory activity in that area to the Federal Government. Finally, if Congress has not displaced state regulation entirely, it may nonetheless pre-empt state law to the extent that the state law actually conflicts with federal law. Such a conflict arises when compliance with both state and federal law is impossible or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Michigan Cannery and Freezers Assoc. v. Agricultural Marketing and Bargaining Board, 467 U.S. 461, 469, 104 S.Ct. 2518, 2523, 81 L.Ed.2d 399 (1984) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941)) (citations omitted).

USAA does not argue that Congress has explicitly defined its intent to pre-empt Section 641(b). Instead, USAA argues that pre-emption has occurred in either the second or the third way as set forth in the above-excerpted quote from *Michigan Cannery*.

We shall first address USAA's argument that Section 641 is pre-empted because Congress has occupied the entire field of regulation pertaining to savings banks. The Supreme Court has explained that congressional intent to pre-empt may be inferred where the scheme of federal regulations is "sufficiently comprehensive to make

reasonable the inference that Congress 'left no room' for supplementary state regulation," *California Savings and Loan Association v. Guerra*, 479 U.S. 272, —, 107 S.Ct. 683, 689, 93 L.Ed.2d 613, 623 (1987); or "where the field is one in which 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985).

In considering whether or not to infer pre-emption from the federal law's occupancy of the field or dominant federal interest, the Supreme Court has expressed the following cautionary note: "Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law." *Id.* at 719, 105 S.Ct. at 2378. This cautionary note is in accord with other statements by the Supreme Court to the effect that pre-emption analysis is to be "tempered by the conviction that the proper approach is to reconcile 'the operation of both statutory schemes with operation of both statutory schemes with one another rather than holding one completely ousted,'" *Merrill Lynch v. Ware*, 414 U.S. 117, 127, 94 S.Ct. 383, 389-90, 38 L.Ed.2d 348 (1973); and "federal regulation of a field of commerce should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained." *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 16 L.Ed.2d 248 (1963).

Analyzing the case before us in light of these principles, we find that Section 641(b) is not pre-empted because of occupancy of the field by federal law.

It should first be noted that we do not dispute many of the arguments advanced by USAA. For example, we agree that the federal scheme under HOLA and the National Housing Act creates "a uniform and comprehensive federally regulated thrift system without state interference."⁵ Furthermore, after carefully considering the Supreme Court's decision in *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982), we recognize, as USAA points out, that "Congress invested the Board with broad authority to regulate federal savings and loans so as to effect the statute's purposes, and plainly indicated that the Board need not feel bound by existing state law." *Id.* at 162, 102 S.Ct. at 3027. In fact, the broad authority vested in the Board is clearly expressed in the federal regulations:

The regulations in this Part 545 are promulgated pursuant to the plenary and exclusive authority of the Board to regulate all aspects of the operations of Federal associations, as set forth in section 5(a) of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464, as amended. This exercise of the Board's authority is preemptive of any state law purporting to address the subject of the operations of a Federal association.

12 C.F.R. § 545.2. Lastly, we do not dispute USAA's statement that the federal regulations governing federal savings banks are voluminous and comprehensive.

Despite our agreement with these arguments advanced by USAA, we cannot infer that federal law has left no room for a state law, such as Section 641(b), which concerns the state's insurance industry. While the federal regulations do occupy the entire field of regulation concerning the *operation* of federal savings banks, we can-

⁵ Plaintiff's Brief Supporting Motion for Summary Judgment in Preemption Issue at 18.

not infer that these federal regulations also occupy the field of regulation concerning the relationship of these banks with other entities, such as insurance companies. The Supreme Court in *Fidelity Federal Savings and Loan* expressly suggested that Congress may not have occupied the entire field:

As we noted above, a savings and loans' mortgage lending practices are a critical aspect of its "operation," over which the Board unquestionably has jurisdiction. Although the Board's power to promulgate regulations exempting federal savings and loans from the requirements of state law may not be boundless, in this case we need not explore the outer limits of the Board's discretion.

Fidelity Federal Savings & Loan, 458 U.S. at 167, 102 S.Ct. at 3029-30.

We find here that Section 641(b) does not address the *operations* of federal savings banks. In other words, it does not attempt to govern the operations of USAA's bank in Texas. Instead, Section 641(b) simply regulates the relationships between licensed insurers in Pennsylvania and other non-insurance entities. Hence, it is our opinion that the federal regulations governing the operations of federal savings banks and the state statute governing affiliations and ownership of insurance companies can coexist.

In a similar vein, USAA's argument that the sheer volume and comprehensiveness of the federal regulations governing federal savings banks indicate the intent to occupy the entire field fails in light of the Supreme Court's statement in *Hillsborough County*:

We are even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress.

To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.

Hillsborough County, 471 U.S. at 717, 105 S.Ct. at 2377. In the instant case, the regulations are admittedly comprehensive; however, the Home Loan Bank Board has indicated an intent to pre-empt only those regulations governing the *operations* of federal savings banks.

USAA's alternative ground for arguing that Section 641(b) is pre-empted is that the state statute is in actual conflict with the federal law. An actual conflict between federal law and state law may pre-empt the state law to the extent it actually conflicts with the federal law. *California Savings and Loan Association*, 479 U.S. at —, 107 S.Ct. at 689, 93 L.Ed. at 623. Such a conflict "occurs either because 'compliance with both federal and state regulations is a physical impossibility,' *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 [83 S.Ct. 1210, 1217], . . ., or because the state law stands 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.*, (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941)). USAA argues that Section 641(b) stands as an obstacle to the federal government's purpose when it approved USAA's ownership of USAA's bank in Texas.

Determining whether state law frustrates congressional purpose is a two-step procedure. First, the court must engage in construction and interpretation of the state and federal statutes, and only then determine if a conflict exists. "[I]n deciding whether any conflict is present, a court's concern is necessarily with 'the nature of the activities which the States have sought to regulate,

rather than on the method of regulation adopted.' " *Chicago and North Western Transportation Company v. Kalo Brick and Tile Co.*, 450 U.S. 311, 317-318, 101 S.Ct. 1124, 1130, 67 L.Ed.2d 258 (1981) (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243, 79 S.Ct. 773, 778, 3 L.Ed.2d 775 (1959)).

It is clear from the state statute that Pennsylvania is seeking only to regulate the *insurance* industry and not the banking industry. Section 641(b) deals exclusively with who may be licensed to sell insurance in this state. It says nothing about who may appropriately become a bank or savings and loan holding company. Admittedly, an insurance company that becomes affiliated with a savings and loan holding company will risk losing its insurance license in Pennsylvania, but that is because the state legislature has determined an affiliation between an insurance company and a saving and loan holding company would adversely affect the insurance industry. The statute does not regulate or protect any industry other than the insurance industry.

It is equally clear that the federal laws in question regulate only the savings and loan industry and not the licensing of insurance companies by states. Indeed, the House Report concerning the Savings and Loan Holding Company Amendments of 1967 explicitly states the purpose of that Act to be

to provide a comprehensive statutory framework for the registration, examination and regulation of holding companies controlling one or more savings and loan associations, the accounts of which are insured by an agency of the Federal Government—the Federal Savings and Loan Insurance Corporation.

H.R.Rep. No. 997, 90th Cong., 2d sess., 1968 U.S. Code Cong. & Ad.News 1601, 1603. Nothing in the Act nor in the Federal Home Loan Bank Board regulations even intimates that the purpose of the Act was to allow

insurance companies to become savings and loan holding companies. Furthermore, nothing in either of the Acts guarantees a state license to sell insurance to an insurance company that becomes affiliated with a savings and loan. The federal and state acts are aimed at two completely separate purposes; they regulate two separate industries; and nothing in the federal act requires states to allow an affiliation between the two. Because there is no actual conflict between federal law and state law in the instant case, USAA has failed to demonstrate federal pre-emption of Section 641(b).

For the foregoing reasons, we shall deny USAA's motion for summary judgment on pre-emption grounds.

IV. COMMERCE CLAUSE

USAA has also moved for summary judgment on Commerce Clause grounds. USAA argues that Section 641(b), when applied to USAA, places a severe burden on interstate commerce, a burden which is excessive in relation to the putative local benefits derived from Section 641(b). USAA further argues that Section 641(b) forces USAA either to cease transacting their insurance business with citizens of Pennsylvania or to surrender their federally-approved ownership of a federal bank in Texas.⁶

The Commerce Clause of the United States Constitution provides that "Congress shall have Power . . . To regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. The Supreme Court has interpreted the Commerce Clause "not only as an authorization for congressional action, but, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation." *Hughes v. Oklahoma*, 441

⁶ USAA does not argue that the Pennsylvania law discriminates against interstate commerce in favor of local business. Indeed, it could not make such an argument because Section 641(b) treats all insurance companies and all savings and loans alike, whether or not they are based in Pennsylvania.

U.S. 322, 326, 99 S.Ct. 1727, 1731, 60 L.Ed.2d 250 (1979). Although a state has the power to regulate matters of legitimate local concerns, it may not impede the free flow of commerce by "discriminating against the articles of commerce coming from outside the state," *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27, 36, 100 S.Ct. 2009, 2015, 64 L.Ed.2d 702 (1980), or by regulating matters of predominant national concern "which, because of the need for national uniformity, demand that their regulation, if any, be prescribed by a single authority." *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767, 65 S.Ct. 1515, 1519, 89 L.Ed. 1915 (1945). The Commerce Clause "also precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the state." *Edgar v. Mite Corp.*, 457 U.S. 624, 642-43, 102 S.Ct. 2629, 2641, 73 L.Ed.2d 269 (1982). Similar to the limitations placed on the jurisdiction of state courts, "any attempt 'directly' to assert extraterritorial jurisdiction . . . would offend sister States and exceed the inherent limits of the State's power." *Id.* at 643, 102 S.Ct. at 2641, (*quoting Shaffer v. Heitner*, 433 U.S. 186, 197, 97 S.Ct. 2569, 2576, 53 L.Ed.2d 683 (1977)).

A state statute that regulates interstate commerce *indirectly* may also be precluded by the Commerce Clause. The appropriate test to apply to a regulation that indirectly regulates interstate commerce is the test enunciated by the Supreme Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970):

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443[80 S.Ct. 813, 816, 4 L.Ed.2d 852 (1960)]. If a

legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142, 90 S.Ct. at 847.

Because Section 641(b) regulates "even-handedly to effectuate a legitimate local public interest," and because it affects commerce only incidentally, we have determined that the *Pike* test is the appropriate test to apply to the facts of the case at bar.

Thus, in accordance with the *Pike* test, we must uphold Section 641(b) unless the burden it imposes on interstate commerce is "clearly excessive in relation to the putative local benefits." We shall first examine the local benefits conferred by Section 641(b). The Commissioner and the intervenors suggest three primary local benefits: (1) to protect the insurance industry from, *inter alia*, unfair competition and economic concentration; (2) to protect consumers from coercive "tie-ins" and other forms of subtle pressure tactics by lending institutions; and (3) to protect the ability of the insurance examiners to monitor adequately the insurance industry. The Commissioner argues that these local benefits will be adversely affected if affiliations between insurance companies and lending institutions are permitted. It is our opinion, however, that in this case the adverse effects of affiliation are either not present where the affiliated bank is outside the jurisdiction, or are readily prevented in ways less burdensome than is prescribed in Section 641(b).

First, the Commissioner and intervenors express concern that without the protection of Section 641(b), the insurance industry faces the risk of unfair competition and economic concentration. However, testimony by Ronald Chronister, the former Acting Deputy Insurance Commissioner, indicates that concentration of economic power

and decreased competition is not a concern with respect to USAA's affiliation with a Texas bank. See Notes of Testimony of Ronald Chronister, November 14, 1985, at 17-18. While we agree with the Commissioner that the consolidation of a large insurer and a large bank, such as Citibank, would produce significant economic clout,⁷ here we are dealing with a small bank in Texas which at the present time has no locations in Pennsylvania.⁸ Secondly, the Commissioner and the intervenors state that Section 641(b) protects the consumer particularly from subtle "tie-in" sales.⁹ The risk of a "tie-in" sale, however, to a resident of Pennsylvania by a Texas bank is almost "nil." *Id.* at 11. Last, the Commissioner and the intervenors suggest that Section 641(b) protects the insurance examiner's ability to examine the solvency of affiliated insurance companies. While the prohibition of all affiliations between lending institutions and insurance companies provides an easier task for the insurance examiners in their examinations of insurance companies, we find that even in the absence of Section 641(b) the insurance examiners would still be able to examine the solvency of affiliated companies. Under the Federal Home Loan Bank Board regulations, the results of bank examinations by the Federal Home Loan Bank Board are available "to other agencies of the United States or a State for use where necessary in the performance of their official duties." 12 C.F.R. § 505.5(b).¹⁰

⁷ Notes of Testimony of Ronald Chronister, November 14, 1985, at 16-17.

⁸ It should be noted, however, that several Pennsylvania residents have credit cards issued by the Texas bank. While we have considered this fact, we find it but one small factor of the many factors we have weighed.

⁹ A "tie-in sale" occurs when a bank conditions the granting of credit upon the purchase of insurance from an affiliated agency or insurance company.

¹⁰ We acknowledge the unsworn declaration of Ronald Chronister filed September 10, 1987, that expresses the Insurance Department's

Now we shall turn to the burdens imposed on commerce by Section 641(b). We find that Section 641(b)'s impact on commerce, when it is applied to USAA, is clearly excessive in relation to its putative local benefits. The Texas bank was properly approved by the appropriate federal agencies. It operates its business in accordance with the applicable federal regulations. It has no locations in Pennsylvania. And, specifically, it sells no insurance in Pennsylvania. USAA's insurance company has more than 40,000 policyholders in Pennsylvania. Its premium income in Pennsylvania exceeds \$35 million per year. Furthermore, it services officers and members of the United States armed forces who frequently move about the nation.

If the Insurance Department enforces Section 641(b) against USAA, USAA will be forced to abandon its insurance business in Pennsylvania or relinquish its interest in the Texas bank. If USAA opts to allow its insurance license to be revoked, this revocation could result in devastating economic consequences.¹¹ On the

difficulty in obtaining reports of examinations pursuant to 12 C.F.R. § 505.5. Regardless, the procedure is available to the Insurance Department and, therefore, it is not impossible for the Department to obtain reports of examinations prepared by the Federal Home Loan Bank Board.

¹¹ The Third Circuit stated the following in *USAA v. Muir* in regard to the irreparable harm USAA would suffer if its insurance license were revoked:

The threat of revocation might alarm an unknown of USAA's more than 40,000 Pennsylvania policyholders into cancelling their insurance. Nationwide, a revocation order even if stayed, would prevent USAA from continuing unqualifiedly to represent that its insurance contracts are available in all 50 states. Because USAA limits its policies primarily to commissioned officers of the United States armed forces, persons who move frequently in the service of their country, the inability to offer insurance coverage in every state may well be a major blow.

Weighing the legal issues and the devastating economic consequences a license revocation would impose upon USAA on

other hand, if USAA were to relinquish its interest in the Texas bank, it would be giving up that which the federal government has authorized it to own. Although Section 641(b) does not require USAA to relinquish its interest in the Texas bank, Section 641(b) certainly has the practical effect of interfering with the business of the Texas bank. We agree with USAA that the choice facing USAA, if Section 641 is enforced against it, is, in practical effect, no choice at all.

The instant situation is much like that encountered by the Supreme Court in *Edgar v. Mite Corp.*, 457 U.S. 624, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982). There, in an effort to protect Illinois shareholders from hostile tender offers, the Illinois legislature passed a law regulating tender offers made to both in-state and out-of-state corporations. The Supreme Court observed that the "most obvious burden the Illinois Act imposes on interstate commerce arises from the statute's previously described nationwide reach which purports to give Illinois the power to determine whether a tender offer may proceed anywhere." *Id.* at 643, 102 S.Ct. at 2641. Weighing this burden against the legitimate local concerns of protecting resident security holders and regulating the internal affairs of companies incorporated under Illinois law, the Court held:

We agree with the Court of Appeals that these asserted interests are insufficient to outweigh the burdens Illinois imposes on interstate commerce.

While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting non-resident shareholders. In-

the one hand and the vague claim of risks to the state from a Texas bank not doing business in Pennsylvania on the other hand, we conclude that the district court erred by holding that state appeal and supersedeas procedures adequately protected USAA's interests.

USAA v. Muir, 792 F.2d at 362-63.

so far as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law.

Id. at 644, 102 S.Ct. at 2641. The same can be said of the instant Pennsylvania law. The burden imposed by Section 641(b) is clearly excessive in relation to the local benefits.

Furthermore, insofar as Section 641(b) is needed to regulate affiliations between insurance companies and lending institutions *within* Pennsylvania where the concerns of the Commissioner and the intervenors become very real, the statute can be more narrowly drawn so that its burden on interstate commerce is lessened and its objectives are still effectuated. In keeping with the standard set forth in *Pike* and followed in *Edgar*, we find that in the case before us the burden imposed on commerce by the instant Pennsylvania law is clearly excessive in relation to the putative local benefits.

The Commissioner argues that we should follow as controlling precedent the case of *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978). In *Exxon*, the plaintiffs challenged, on Commerce Clause grounds, a Maryland statute prohibiting producers and refiners of petroleum products from operating retail service stations within the state. The Supreme Court held that the Maryland statute was constitutional; the statute did not discriminate against interstate goods, favor local producers or refiners, or impermissibly burden interstate commerce. One of the plaintiff's arguments was that the divestiture requirements would cause several refiners to stop selling in Maryland and deprive consumers of their services. In response, the Court stated that these factors did not warrant a finding of an impermissible burden. The Court further stated that "[i]t may be true that the consuming public will be injured by the loss of . . . stations operated by the independent refiners, but again that argument relates to the wisdom of the statute,

not to its burden on commerce.” *Id.* at 128, 98 S.Ct. at 2215.

We carefully considered the instant case in light of the holding in *Exxon*. Indeed, there is one obvious similarity. A corporation which has been conducting business within a state is required by a state statute to cease doing business in that state. Similar to the independent refiners in the *Exxon* case, USAA, if Section 641(b) were enforced against it, would be forced to leave Pennsylvania due to a state law. Because of this basic similarity between *Exxon* and the instant case, it would be simple to end the comparison of the cases at that point and declare Section 641(b) constitutional. However, we find that unlike the Pennsylvania statute in our case, the Maryland statute in the *Exxon* case did not reach beyond the borders of the state. It simply and unequivocally banned refiners and producers from operating retail stations. It did not have the practical effect of indirectly regulating the refiners’ ownership of other entities outside the state.

In contrast, Section 641(b), in practical effect, reaches beyond Pennsylvania’s borders to interfere with the ownership of a federal savings and loan bank in Texas which was properly approved by and operates under the regulations of the appropriate federal agencies. In this sense, the instant case is more nearly like the situation presented in *Edgar* wherein the Illinois statute had the practical effect of reaching beyond the state borders to affect indirectly commerce in other states.¹²

¹² The Commissioner also brought to our attention the cases of *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960), and *Norfolk Southern Corporation v. Oberly*, 822 F.2d 388 (3d Cir. 1987). We distinguish both cases from our case on the basis that they address environmental regulations, as opposed to economic regulations. For example, in *Huron* the Court stated:

In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the

Finding that the burdens imposed on commerce by Section 641(b) of the Pennsylvania Insurance Department Act are clearly excessive in relation to the putative local benefits and that Section 641(b) could be more narrowly drawn and still serve the purposes for which the statute was enacted, we find Section 641(b) as applied here unconstitutional under the Commerce Clause of the United States Constitution.¹³ We shall, therefore, grant USAA's motion for summary judgment and, accordingly, enter judgment in favor of USAA and against the Insurance Commissioner.

An appropriate order will be entered.

ORDER

AND NOW, this 23rd day of December, 1987, in accordance with the accompanying Memorandum, IT IS HEREBY ORDERED that the defendant's motion for summary judgment on abstention grounds and the plaintiffs' motion for summary judgment on pre-emption grounds are denied.

IT IS FURTHER ORDERED that the plaintiffs' motion for summary judgment on Commerce Clause grounds is granted. Section 641(b) of the Pennsylvania Insurance Act of 1921, 40 Pa.S. § 281, as applied to the plaintiffs,

Constitution when 'conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.'

Huron, 362 U.S. at 443-44, 80 S.Ct. at 816. Although the same balancing test is applicable in situations involving environmental regulations and economic regulations, it appears to us that more deference is typically given to a local or state environmental regulation.

¹³ We also find that there is no genuine issue as to any material facts. Fed.R.Civ.P. 56(c).

is unconstitutional under the Commerce Clause of the United States Constitution. Accordingly, the defendant is permanently enjoined from taking further action to revoke the plaintiffs' insurance licenses.

IT IS FURTHER ORDERED that the Clerk of Court is directed to enter judgment in favor of the plaintiffs and against the defendant and to close the file in this case.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. 86-561

GEORGE F. GRODE, Insurance Commissioner of the
Commonwealth of Pennsylvania,
Petitioner

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION, *et al.*

Case below, *United Services Auto. Ass'n v. Muir*, 792
F.2d 356.

Petition for writ of certiorari to the United States
Court of Appeals for the Third Circuit.

Jan. 12, 1987. Denied.

APPENDIX E

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 85-5662

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Texas Reciprocal Interinsurance Exchange, and USAA CASUALTY INSURANCE COMPANY, a Texas Stock Insurance Company, USAA LIFE INSURANCE COMPANY, a Texas Stock Insurance Company, and USAA ANNUITY AND LIFE INSURANCE COMPANY, a Texas Stock Insurance Company

v.

WILLIAM J. MUIR, III, Acting Insurance Commissioner
of the Commonwealth of Pennsylvania.

Appeal of United Services Automobile Association,
USAA Casualty Insurance Company, USAA Life
Insurance Company, and USAA Annuity and
Life Insurance Company,
Appellants.

Argued March 6, 1986

Decided June 6, 1986

Michael L. Browne, Christopher W. Walters, (Argued),
J. Thomas Morris, Reed Smith Shaw & McClay, Philadelphia, Pa., Robert B. Hoffman, Reed Smith Shaw & McClay, Harrisburg, Pa., for appellants.

Leroy S. Zimmerman, Atty. Gen., Ellis M. Saull, (Argued), Deputy Atty. Gen., Andrew S. Gordon, Senior Deputy Atty. Gen., Allen C. Warshaw, Executive Deputy Atty. Gen., Office of Atty. Gen., Harrisburg, Pa., for appellee.

Before GIBBONS, BECKER, and ROSENN, Circuit Judges.

OPINION OF THE COURT

ROSENN, Circuit Judge.

This appeal requires us to examine various forms of abstention advanced by the district court in choosing to refrain from exercising jurisdiction. Included is an unsettled question under the abstention doctrine promulgated in *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941): whether a claim that federal statutes preempt state law under the supremacy clause raises a substantial constitutional question which permits abstention.

United Services Automobile Association (USAA) and some of its subsidiary insurance companies filed suit against William J. Muir, III, as Acting Insurance Commissioner of the Commonwealth of Pennsylvania, seeking to enjoin the state insurance department from revoking USAA's license to insure persons in Pennsylvania. The insurance department asserts that USAA following its purchase of a Texas bank is in violation of a Pennsylvania statute prohibiting mergers between financial institutions and insurers. USAA argues that such a construction of the state statute is preempted by federal banking statutes that permitted it to purchase the bank and otherwise violates the constitution. The United States District Court for the Middle District of Pennsylvania concluded that abstention applied, and dismissed the suit.¹ We disagree and reverse.

¹ The district court had jurisdiction under 28 U.S.C. § 1331 (1982) (federal questions), 28 U.S.C. § 1332 (1982) (diversity), and 28

I.

The relevant facts as stated in USAA's complaint are not disputed in this appeal. USAA is a reciprocal inter-insurance exchange² organized under the laws of Texas. USAA and three of its wholly owned insurance company subsidiaries, with which it filed this suit, have their principal place of business in San Antonio, Texas. They limit their insurance services primarily to commissioned officers of the United States armed forces and do business nationwide. They provided insurance services in 1983 to more than 40,000 Pennsylvania policy holders who paid more than \$35,000,000 in annual policy premiums.

That year, USAA Financial Services Company (then known as USAA Development Company), a wholly owned subsidiary of USAA, applied for and received from the Federal Home Loan Bank Board and the Federal Savings & Loan Insurance Corporation (FSLIC) permission to organize and operate the USAA Federal Savings Bank (the Bank) in San Antonio, Texas. USAA Financial Services also received permission from the FSLIC to serve as a unitary savings and loan holding company. The insurance department does not allege that USAA

U.S.C. § 1337 (1982) (statutes affecting commerce). For diversity purposes, USAA and its subsidiaries are residents of Texas, and Muir is a resident of Pennsylvania. Dismissal following an abstention order is a final judgment reviewable by this court under 28 U.S.C. § 1291 (1982). *Baltimore Bank for Cooperatives v. Farmers Cheese Cooperative*, 583 F.2d 104, 109 (3d Cir. 1978).

² In a reciprocal interinsurance exchange, individuals, partnerships, or corporations engaged in a similar line of business undertake to indemnify each other against a certain kind or kinds of losses by means of a mutual exchange of insurance contracts . . . whereby each member separately becomes both an insured and an insurer with several liability only.

2 *Couch on Insurance*, § 18:11 at 614-15 (2d ed. 1984).

failed to comply with any requirements of federal law in organizing the Bank. USAA has made an initial investment of more than \$20,000,000 through its subsidiary to capitalize the Bank. The subsidiary holding company and the Bank are not parties to this suit. The Bank does not solicit deposits from Pennsylvania residents or do business in Pennsylvania.

In mid-1984, the Pennsylvania insurance department notified USAA that its ownership of a bank violated section 641 of the Pennsylvania Insurance Act of 1921, and that "USAA must, to continue its business in Pennsylvania, divest itself of the Bank, or, failing such divestiture, risk revocation of its license to transact insurance business in Pennsylvania." The Pennsylvania Insurance Act of 1921, section 641, as amended in 1974, provides in relevant part:

(b) No lending institution, . . . bank holding company, savings and loan holding company [as defined in federal statutes] or any subsidiary or affiliate of the foregoing, or officer or employee thereof, may directly or indirectly, be licensed or admitted as an insurer . . . in this State. . . .

(c) The Insurance Commissioner is authorized to promulgate regulations in order to effectuate the purposes of the section, which are to help maintain the separation between lending institutions and public utilities and the insurance business and to minimize the possibilities of unfair competitive practices by lending institutions . . . against insurance companies, agents and brokers.

Codified at 40 Pa.Stat.Ann. § 281 (Purdon 1985 Supp.).

The insurance department argued that because USAA Financial Services is a federally regulated savings and loan holding company, as defined by federal statutes and USAA solely owns USAA Financial Services, the latter is its affiliate and USAA is therefore in violation of section 641(b). In reply, USAA asserted that section 641 is

ambiguous and can be read not to apply to it. Section 641(c) states that the purpose of section 641 is to help maintain the separation between lending institutions and the insurance business and minimize the possibilities of unfair competitive practices by lending institutions. Under section 641(a)(1),³ a lending institution means any institution that does banking business in Pennsylvania. By reading parts (a)(1) and (c) of section 641 together, USAA argued that the purpose of the section is limited to preventing financial institutions doing business in *Pennsylvania* from competing or being affiliated with Pennsylvania insurers; as the Bank is based and does business only in Texas, the section does not apply to USAA.

USAA and its plaintiff subsidiaries filed suit in the district court under 42 U.S.C. § 1983, alleging that the insurance department's proposed reading of section 641 violated the supremacy, equal protection, and due process clauses of the constitution, and seeking declaratory and injunctive relief. One month after USAA filed suit, the insurance department commenced state administrative proceedings for the revocation of USAA's insurance licenses in Pennsylvania and filed in the district court a motion to dismiss the suit on abstention grounds. While the district court considered this motion, USAA filed a motion for summary judgment on preemption grounds. Citing *Pullman, supra*, *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), and *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), the district court concluded that it should ab-

³ Section 641(a)(1) provides:

(a) As used in this section [641]:

(1) "Lending institution" means *any institution that accepts deposits and lends money in the Commonwealth of Pennsylvania*, including banks and loan associations, but excluding insurance companies.

Codified at 40 Pa.Stat. Ann. § 281(a)(1) (emphasis added).

stain from addressing USAA's suit, and dismissed the suit without considering USAA's summary judgment motion. USAA appealed.

On November 22, 1985, this court granted a motion for an injunction preventing the insurance department from revoking USAA's licenses pending resolution of this appeal. The Pennsylvania Insurance Commissioner has heard testimony in the administrative proceedings to revoke USAA's licenses, but, as of oral argument, he had not announced any decision.

II.

Abstention from the exercise of federal jurisdiction is, in all its forms, "the exception, not the rule." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976). It is an extraordinary and narrow exception to the district court's duty to adjudicate a controversy properly before it, justified only in the exceptional circumstances where resort to state proceedings clearly serves an important countervailing interest. *Id.*

In reviewing abstention decisions, appellate courts apply the various criteria for abstention articulated by the Supreme Court in much the same way they would apply provisions of a statute. 1A J. Moore, *Federal Practice* ¶ 0.203[1] at 2106 (1985). A district court has little or no discretion to abstain in a case that does not meet traditional abstention requirements. *C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1985). Within these constraints, determination whether the exceptional circumstances required for abstention exist is left to the district court, and will be set aside on review only if the district court has abused its discretion. *Harman v. Forssenius*, 380 U.S. 528, 534, 85 S.Ct. 1177, 1181, 14 L.Ed.2d 50 (1965); *United States v. City of Pittsburgh*, 757 F.2d 43, 45 (3d Cir. 1985). Determinations that are essentially legal, such as deciding whether in-

terpretation of a state law is unsettled, are reviewed de novo on appeal. *D'Iorio v. County of Delaware*, 592 F.2d 681, 686 (3d Cir. 1978), *overruled on other grounds*, *Kershner v. Mazurkiewicz*, 670 F.2d 440 (3d Cir. 1982) (in banc). We therefore turn to an analysis of the abstention grounds on which the district court relied.

III.

Pullman abstention, as most recently defined by the Supreme Court, instructs "that federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236, 104 S.Ct. 2321, 2327, 81 L.Ed.2d 186 (1984). USAA advances three principal grounds for not applying *Pullman* abstention in this case: there is no unsettled question of state law; abstention would cause USAA substantial and irreparable economic harm; and its preemption claim does not constitute a substantial federal constitutional question.

A.

For *Pullman* to apply, the state statute must be "obviously susceptible of a limiting construction" and "a bare, though unlikely, possibility that state courts *might* render adjudication of the federal question unnecessary" is insufficient. *Hawaii Housing*, 467 U.S. at 237, 104 S.Ct. at 2327 (emphasis in original). A statute is unsettled for *Pullman* purposes when two of its provisions are contradictory. *Georgevich v. Strauss*, 772 F.2d 1078, 1090-91 (3d Cir. 1985) (in banc), *cert. denied*, — U.S.—, 106 S.Ct. 1229, 89 L.Ed.2d 339 (1986). In seeking *Pullman* abstention, the insurance department has argued that the provisions of section 641 are ambiguous and contradictory, and that with no state court decisions interpreting the section, its meaning is unsettled. In reply, USAA contends that the insurance department's

interpretation of the laws it is charged with enforcing and its actions implementing that interpretation renders the statute unambiguous.

The Supreme Court has held that *Pullman* abstention is not appropriate if an otherwise ambiguous statute has been authoritatively construed by the state courts, see e.g., *Kusper v. Pontikes*, 414 U.S. 51, 55-56, 94 S.Ct. 303, 306-07, 38 L.Ed.2d 260 (1973), but it has not held that an *administrative* interpretation will suffice as an authoritative reading of state law. Although one court has suggested that an administrative interpretation of a statute that creates a constitutional problem eliminates the statute's ambiguity, the challenged statute in that case was clear on its face and not susceptible of any other construction. *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1126 (8th Cir. 1982). Indeed, an administrative interpretation that would moot the constitutional issue raised by another reading of an ambiguous statute fortifies the claim for abstention. See, e.g., *Bellotti v. Baird*, 428 U.S. 132, 148, 96 S.Ct. 2857, 2866, 49 L.Ed.2d 844 (1976); *Georgevich*, 772 F.2d at 1090-91.

Generally, an administrative interpretation of a facially ambiguous state statute will not remove the ambiguity, for *Pullman* purposes. See *Anderson v. Babb*, 632 F.2d 300, 306 (4th Cir. 1980). In keeping with statutorily imposed maxims for construing legislative intent, Pennsylvania courts ordinarily defer to administrative interpretations of statutes. See 1 Pa. Cons.Stat. Ann. § 1921 (c) (8) (Purdon 1985 Supp.). The interpretation given a statute by the agency charged with its execution and application "is entitled to great weight and should be disregarded or overturned only for cogent reasons or if such construction is clearly erroneous." *Cohen v. Pennsylvania Public Utility Commission*, 90 Pa.Cmwlt. 98, 494 A.2d 58, 61 (1985); see *Wiley House v. Scanlon*, 502 Pa. 228, 465 A.2d 995, 999 (1983) (administrative interpretation of a regulation followed unless it is plainly

erroneous or inconsistent with the authorizing statute). Although the insurance department's interpretation of section 641 is not clearly erroneous, USAA's cogent alternative interpretation that the statute does not apply to lending institutions that do not do business in Pennsylvania might well be adopted by the state courts. Thus, despite the deference Pennsylvania courts pay administrative interpretations, we cannot say that they would accept the insurance department's interpretation of section 641 as a definitive statement of Pennsylvania law. The state law is therefore unsettled for *Pullman* purposes.

B.

USAA also argues that the potential damage that its business would suffer during state administrative and court proceedings outweighs any important countervailing interests of Pennsylvania in abstention. The Supreme Court has held that a district court was fully justified in not abstaining when the constitutionality of a narrow and specific—though ambiguous—state statute was at issue, and any delay in settling the issue would result in substantial economic losses. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 140 & n. 3, 90 S.Ct. 844, 846 & n. 3, 25 L.Ed.2d 174 (1970) (allegedly unconstitutional state regulation threatened loss of \$700,000 fruit crop). This court observed that undue delay and the increased cost of state litigation made abstention unnecessary when the federal court in resolving the constitutional issue “would not upset sensitive state programs” and the issue was neither novel nor difficult. *McKnight v. Southeastern Pennsylvania Transportation Authority*, 583 F.2d 1229, 1241 (3d Cir. 1978) (narrow due process rights of certain state employees facing dismissal). The court, however, did not find that the district court abused its discretion by abstaining. *Id.* at 1242.

The insurance department has indicated a willingness to expedite consideration of USAA's claims in state procedures, and to agree to a stay of execution in the event

of an administrative decision adverse to USAA until judicial proceedings were completed. USAA explains plausibly, however, how a state administrative order to revoke its insurance license, even if stayed, would in itself hurt its reputation generally and impair its marketing of insurance, even in other states, regardless of the time factor in litigating. It is uncontested that USAA has an excellent nationwide reputation as an insurer and is financially sound. The threat of a license revocation, a harsh sanction, may suggest in the marketplace fraudulent or illegal activity or financial instability. It could be difficult or perhaps impossible for USAA to explain to consumers and to the insurance industry that the license revocation proceedings in Pennsylvania do not represent such a sanction. The threat of revocation might alarm an unknown number of USAA's more than 40,000 Pennsylvania policyholders into cancelling their insurance. Nationwide, a revocation order even if stayed, would prevent USAA from continuing unqualifiedly to represent that its insurance contracts are available in all 50 states. Because USAA limits its policies primarily to commissioned officers of the United States armed forces, persons who move frequently in the service of their country, the inability to offer insurance coverage in every state may well be a major blow.

Weighing the legal issues and the devastating economic consequences a license revocation would impose upon USAA on the one hand and the vague claim of risks to the state from a Texas bank not doing business in Pennsylvania on the other hand, we conclude that the district court erred by holding that state appeal and supersedeas procedures adequately protected USAA's interests. See *Professional Plan Examiners of New Jersey v. Lefante*, 750 F.2d 282, 290-91 (3d Cir. 1984).

C.

Alternatively, USAA asserts that its claim that federal statutes preempt contrary state insurance laws does not pose the substantial federal constitutional claim required for *Pullman* abstention. *Hawaii Housing*, 467 U.S. at 236, 104 S.Ct. at 2327. The Ninth Circuit supports this claim for it has held that *Pullman* abstention is inappropriate for preemption questions grounded in the supremacy clause. *Knudsen Corp. v. Nevada State Dairy Commission*, 676 F.2d 374, 377 (9th Cir. 1982). "Although preemption has its doctrinal base in the Constitution, the question is largely one of determining the compatibility of a state and a federal statutory scheme. No constitutional issues of substance are presented." *Id.* The Tenth Circuit recently reached the same conclusion, stating in strong dictum that "[t]he Supreme Court does not appear to view federal preemption questions based only on the Supremacy Clause as the type of constitutional issues that the *Pullman* doctrine counsels courts to avoid." *Federal Home Loan Bank Board v. Empie*, 778 F.2d 1447, 1451 n. 4 (10th Cir. 1985); see *International Longshoremen's Association, AFL-CIO v. Waterfront Commission of New York Harbor*, 495 F.Supp. 1101, 1113-14 & nn. 15-18 (S.D.N.Y. 1980), *modified in other part*, 642 F.2d 666 (2d Cir.), *cert. denied*, 454 U.S. 966, 102 S.Ct. 509, 70 L.Ed.2d 383 (1981). These recent cases appear to reflect a growing trend.

This court recently has also suggested in dicta that preemption questions are not appropriate for *Pullman* abstention. In reversing a district court abstention decision, we stated that "[i]t would be inconsistent with our paramount duty to interpret and protect federal law to invoke *Pullman* abstention in this preemption case." *Kennecott Corp. v. Smith*, 637 F.2d 181, 185 (3d Cir. 1980). Supremacy clause claims essentially involve federal policy and "the federal courts are particularly appropriate bodies for the application of preemption prin-

ciples." *Id.* (quoting *Hagans v. Lavine*, 415 U.S. 528, 550, 94 S.Ct. 1372, 1386, 39 L.Ed.2d 577 (1974)). Because the questioned state statute in *Kennecott* unambiguously conflicted with the federal statute, there was no unsettled state law question requiring *Pullman* abstention. 637 F.2d at 185.

The Supreme Court has held that "the basic question involved in [preemption claims under the supremacy clause] is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes," *Swift & Co. v. Wickham*, 382 U.S. 111, 120, 86 S.Ct. 258, 263, 15 L.Ed.2d 194 (1965), and where a case involves a nonconstitutional federal issue, the necessity for deciding which depends on the decision of an underlying state law, the federal courts, when necessary, decide both issues. *Propper v. Clark*, 337 U.S. 472, 490, 69 S.Ct. 1333, 1343, 93 L.Ed. 1480 (1949). The holdings of *Swift* and *Propper*, read together, suggest that a federal court should not abstain under *Pullman* from interpreting a state law that might be preempted by a federal law, because preemption problems are resolved through a non-constitutional process of statutory construction. See 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4242 at 454-55 (1978) (*Pullman* abstention inappropriate in a supremacy clause case); cf. 1A J. Moore, *Federal Practice* § 0.203[2] at 2141 (1985) (where clear conflict between federal and state statutes, no abstention appropriate).

Because USAA had pled other constitutional violations in its complaint, the district court declined to consider whether its preemption argument, taken alone, justified preemption. USAA's preemption claim was the sole basis for its motion for summary judgment, however, and is easily separable from its other claims should USAA choose to pursue them. Accordingly, we hold that preemption claims under the supremacy clause are not substantial federal constitutional issues for which *Pullman*

abstention might be appropriate.⁴ Thus, the district court erred in deciding that the preemption claim also afforded a basis for abstention on *Pullman* grounds.

IV.

Under *Burford*, abstention is appropriate "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Colorado River*, 424 U.S. at 814, 96 S.Ct. at 1244. If the exercise of federal review would be disruptive of state efforts to establish a coherent policy, and the policy concerns complicated local matters, abstention may be justified. *Id.* Generally, *Burford* abstention is justified where a complex regulatory scheme is administered by a specialized state tribunal having exclusive jurisdiction. *See, Allegheny Airlines, Inc. v. Pennsylvania Public Utility Commission*, 465 F.2d 237, 241-45 (3d Cir. 1972), *cert. denied*, 410 U.S. 943, 93 S.Ct. 1367, 35 L.Ed.2d 609 (1973); *see generally*, 1A J. Moore, *supra* ¶ 0.203[2] at 2140-41 (collecting cases).

The district court in the present case found that *Burford* abstention was appropriate because the McCarran-Ferguson Act gave the states exclusive control over the regulation of insurance, 15 U.S.C. § 1012 (1982), and because section 641 is part of a complex regulatory scheme governing insurance. It cited *Levy v. Lewis*, 635 F.2d 960 (2d Cir. 1980), which held that abstention was proper to allow a state regulatory body to settle claims against a liquidating insurer. The *Levy* court found it "highly significant that the state scheme has been adopted

⁴ We note that a panel of this court has very recently held on other grounds that preemption questions are often not suitable for abstention under the doctrines announced in *Burford* and *Younger*. *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Co.*, 791 F.2d 1111, 1116-17, 1117-18 (3d Cir. 1986).

pursuant to congressional authorization" under McCarran-Ferguson. 635 F.2d at 963.

The Supreme Court has established a three-part test for determining whether state regulation is part of the business of insurance, 15 U.S.C. § 1012(a) & (b), reserved to the states by McCarran-Ferguson:

[F]irst, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.

Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129, 102 S.Ct. 3002, 3009, 73 L.Ed.2d 647 (1982). "None of these criteria is necessarily determinative in itself." *Id.* The state regulations implicated in *Levy* concerned both the future coverage of policyholders and their relationship with a defunct insurer, and so were authorized under McCarran-Ferguson. The purpose of section 641, as stated in its part (c), is to prevent competition between insurers and Pennsylvania financial institutions. Unlike the regulations in *Levy*, the section is not concerned with transferring or spreading the policyholder's risk; affiliation between insurers and banks has no integral connection to the relationship between the insured and insurer; and banks are not entities within the insurance industry. Regulations such as section 641 have no part in the business of insurance under McCarran-Ferguson.

The district court also thought *Burford* abstention was appropriate because section 641 is part of an "extensive and complicated . . . state regulatory scheme." The interpretation of section 641 in this case does not require consideration of any other Pennsylvania statute and the relevant facts are simple and undisputed; no complicated regulatory scheme is involved. The insurance department has not suggested any peculiar local condi-

tions or special expertise required to interpret the statute. The state proceeding merely involves reading and construing a statute, a task for which courts are best equipped, and not administrative factual determinations, such as are involved in the setting of a proper utility rate. The district court erred in applying *Burford* to this case.

V.

Under *Younger*, "interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state *judicial* proceedings that concern important state interests." *Hawaii Housing*, 467 U.S. at 237-38, 104 S.Ct. at 2327-28 (emphasis added). *Younger* abstention is required only when the state court proceedings are initiated prior to any proceedings on the substance of the merits in federal court. *Id.* at 238, 104 S.Ct. at 2328. USAA argues that *Younger* abstention was inappropriate here because state proceedings did not commence until sometime after the federal suit was filed, and because these proceedings were administrative and could not address constitutional arguments.

The commencement of administrative proceedings after the federal suit was filed, even with the intention of removing federal jurisdiction by abstention, does not preclude the application of *Younger*. So long as "the federal litigation was in an embryonic stage and no contested matter had been decided," the district court may abstain under *Younger*. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 929, 95 S.Ct. 2561, 2566, 45 L.Ed.2d 648 (1975). In the present case, the district court had taken no action on the substance of USAA's claim when administrative proceedings commenced.

This court has held that "where federal intervention into state administrative proceedings would be substantial and disruptive, and *where the proceedings are adequate to vindicate federal claims and reflect strong and*

compelling state interests, the district court, pursuant to *Younger*, should abstain." *Williams v. Red Bank Board of Education*, 662 F.2d 1008, 1017 (3d Cir. 1981) (emphasis added). The Supreme Court, however, held in *Hawaii Housing* that administrative proceedings that are part of, and are not themselves, judicial proceedings, do not trigger *Younger* abstention. 467 U.S. at 238, 104 S.Ct. at 2328. In *Hawaii Housing* an administrative arbitration proceeding, by statute, was separate from any subsequent judicial condemnation proceeding. In the present case, where an administrative decision to revoke USAA's insurance license could be appealed through the Pennsylvania courts, it is more difficult to determine whether the administrative proceeding is part of the state's judicial process.

USAA's federal claims are of constitutional dimension. As this court stated in *Red Bank*, administrative proceedings suffice for *Younger* purposes only when they "are adequate to vindicate federal claims." The Supreme Court has held that administrative proceedings that are forbidden by state law from considering federal constitution claims will not invoke *Younger* because there is no "adequate opportunity in the state proceedings to raise constitutional challenges." *Middlesex Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982). We believe a state administrative proceeding is part of its judicial process, for *Younger* purposes, only if it provides an adequate opportunity to raise constitutional challenges.

It appears to be settled law in Pennsylvania that an administrative agency may not determine the constitutionality of the statutes it applies. *Borough of Green Tree v. Board*, 459 Pa. 268, 328, A.2d 819, 825 (1974); *Delaware Valley v. Commissioner*, 36 Pa.Cmwlth. 615, 389 A.2d 234, 237 (1978). The insurance department in its internal documents has acknowledged this limitation. Because the insurance department in its administrative proceedings cannot consider USAA's constitutional argu-

ments, its administrative proceedings are not part of Pennsylvania's judicial process and the district court erred in abstaining under *Younger*.

VI.

We conclude that the district court erred in abstaining from considering USAA's preemption claim and dismissing its suit. The order of dismissal will be reversed and the case remanded to the district court for proceedings consistent with this opinion.

BECKER, Circuit Judge, concurring.

I concur in the judgment and in all but Part III.B of the majority's opinion. I write separate to explain my disagreement with one ground for the majority's holding that *Pullman* abstention is improper in this case. The majority states that the balance of the interests disfavors abstention because the potential damage to United Services Automobile Association's ("USAA") business during state administrative and court proceedings outweighs the state interests in abstention. I disagree, however, and believe that such a holding may have dangerously broad implications.

There are certainly cases in which the burdens imposed upon a plaintiff by abstention outweigh the interests served by application of the *Pullman* rule and in which the balance of interests therefore counsels against abstention. However, I do not believe that this is such a case. The state administrative and judicial proceedings that USAA would face are no more cumbersome than the state procedures available to any state litigant. The fact that USAA would have to receive an administrative ruling before it could present its case to a state court does not render its situation significantly more harmful than it if [*sic*] could proceed directly to federal court.¹ By per-

¹ This is especially true because the administrative hearing is over and the administrative decision will apparently be announced soon.

mitting USAA to prevail on this argument, the majority creates a precedent that could allow virtually any litigant faced with relatively complex state litigation to avoid the application of the *Pullman* abstention doctrine.

USAA has convinced the majority that ongoing license revocation litigation would drastically damage its reputation and thus impair its marketing of insurance. I am not convinced, however, that the harm that such litigation would impose upon USAA is significantly different from or greater than the harm that important ongoing litigation imposes upon any litigant. For example, if a company were threatened with a large fine or penalty as the result of a state proceeding, the litigation might affect the value of its stock. Yet I do not believe that this predictable side-effect of litigation would justify a denial of *Pullman* abstention, if abstention were otherwise proper. In *Bellotti v. Baird*, 428 U.S. 132, 96 S.Ct. 2857, 49 L.Ed. 2d 844 (1976), the continuing existence of a statute that governed the type of consent required before an abortion could be performed on a woman under the age of eighteen imposed a substantial burden on individuals to whom it applied. Although the Court acknowledged that "[e]ach day the statute is in effect, irretrievable events, with substantial personal consequences, occur," 428 U.S. at 151, 96 S.Ct. at 2868, it nevertheless held that abstention was proper. I do not believe that the type of harm that abstention would inflict upon USAA in this case is any greater than the type of harm caused to young women during that state litigation ordered in *Bellotti v. Baird*.

It is significant that, as the majority has pointed out, the insurance department has proposed ways of mitigating the harm that state litigation would impose upon USAA. It "has indicated a willingness to expedite consideration of USAA's claims in state procedures, and to agree to a stay of execution in the event of an administrative decision adverse to USAA until judicial proceedings were completed." Maj.Op. at 362. Such ex-

petition reduces the burden that resort to the state system creates for USAA. *Cf. Bellotti v. Baird, supra*, 428 U.S. at 150-51, 96 S.Ct. at 2628 (procedure for certifying issues directly to the state supreme court reduces relative burden of abstention, so that abstention is appropriate even in case in which the "importance of speed in resolution . . . is manifest"). The proposed stay of execution of a license revocation order also distinguishes this case from *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), cited by the majority, in which the plaintiffs were subject to a state enforcement order which would impair their existing business activity.

Because I believe that the harm threatened to USAA is not significantly greater than the harm that state litigation would inflict upon any litigant, I believe that the majority's assessment of the balance of the interests in this case creates an exception that could swallow the abstention rule. Indeed, almost any litigant opposing *Pullman* abstention can make out a case as strong as USAA's. I think that the balance of the interests approach as a basis for avoiding *Pullman* abstention should be reserved for extreme cases, such as *Pike v. Bruce Church, Inc., supra*, 397 U.S. at 139, 90 S.Ct. at 845-46, in which an emergency situation was presented because the company faced an imminent loss of its cantaloupe crop as a result of a state enforcement order, while only "a narrow and specific application" of a state statute was challenged as unconstitutional.²

² Not only do I find that the harm that abstention would impose upon USAA in this case is not unusually great, but I also find that the countervailing state interest in interpreting its regulation is not unusually small. Unlike the situation in *McKnight v. Southeastern Pennsylvania Transportation Authority*, 583 F.2d 1229, 1241 (3d Cir. 1978), in which resolution of the constitutional issue before definitive state interpretation of a statute "would not upset sensitive state programs," federal intervention into the interpretation of Pennsylvania insurance regulations would be quite intrusive.

I do, however, agree with the majority's other ground for holding that this is not a proper case for *Pullman* abstention: *Pullman* abstention should not be employed to avoid a ruling on a claim of federal preemption because such a claim does not call for substantial federal constitutional adjudication. I would base the holding on that ground alone.

APPENDIX F

**IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA**

Civil No. 84-1596

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Texas
Reciprocal Interinsurance Exchange and USAA CAS-
UALTY INSURANCE COMPANY, A Texas Stock Insurance
Company, and USAA LIFE INSURANCE COMPANY,
a Texas Stock Insurance Company, and USAA AN-
NUITY AND LIFE INSURANCE COMPANY, a Texas Stock
Insurance Company,

Plaintiffs,

vs.

WILLIAM J. MUIR, III, Acting Insurance Commissioner
of the Commonwealth of Pennsylvania,

Defendant.

MEMORANDUM

[Filed September 30, 1985]

This action is a challenge to Section 641 of Pennsyl-
vania's Insurance Department Act of 1921, 40 Pa. C.S.A.
§ 281. Plaintiff United Services Automobile Association
and its affiliates (hereinafter U.S.A.A.) question the con-
stitutionality of this section under the Commerce Clause,
Supremacy Clause, Due Process Clause of the Four-
teenth Amendment, and Equal Protection Clause of the
Fourteenth Amendment, Section 641 effectively prohibits
any insurer who is directly or indirectly tied to a bank,
public utility, savings and loan company, or the like,
from doing business within the Commonwealth of
Pennsylvania.

I. BACKGROUND

U.S.A.A. is a reciprocal interinsurance exchange organized and existing under the laws of the state of Texas. Its principal place of business is in San Antonio, but it is licensed to sell insurance in Pennsylvania. In April, 1984, U.S.A.A. Financial Services, a wholly-owned subsidiary of U.S.A.A., filed an application with the Federal Home Loan Bank Board for a *de novo* Federal Savings Bank Charter for the U.S.A.A. Federal Savings Bank. After submission of the appropriate documents, the bank received its charter and began operations in San Antonio on December 30, 1983. This bank does no business in Pennsylvania.

In July, 1984, the Pennsylvania Insurance Department communicated to U.S.A.A. its belief that the operation of the U.S.A.A. Federal Savings Bank placed U.S.A.A. in violation of § 641 of the Insurance Department Act. In subsequent communications, the Insurance Department advised U.S.A.A. that it must divest itself of the Bank in order to continue operating in Pennsylvania.

In October, 1984, U.S.A.A., by its attorney, responded to the Insurance Department's objections to U.S.A.A.'s indirect acquisition of the Bank and offered an interpretation of § 641 that did not prohibit such an affiliation. When the Insurance Department continued to maintain that U.S.A.A. was in violation of § 641, U.S.A.A. instituted this action against the Acting Insurance Commissioner for a declaratory judgment that § 641 is unconstitutional as applied to U.S.A.A.'s ownership of the Bank and for an injunction against enforcement of § 641 against U.S.A.A.

Defendant responded to December 24, 1984 by moving to dismiss the complaint or stay the proceedings on the ground that the federal courts should abstain from deciding this issue. On the same day, the Insurance Department issued an Order to Show Cause, directing plaintiffs

to appear at an administrative hearing for the purpose of determining whether or not plaintiffs have violated § 641(b) of the Insurance Department Act. Plaintiffs opposed the abstention motion and, on January 25, 1985, filed their own motion for summary judgment on preemption grounds. Both of these motions are now before us, but because we find that defendant's abstention motion has merit, we do not reach the preemption issue.

II. ABSTENTION

In certain situations, a federal court may be justified in refusing to exercise its jurisdiction over a cause of action, even though jurisdiction may exist under the constitution and appropriate statutes. Such refusal to exercise jurisdiction is labelled abstention. The abstention doctrine is really a collection of four different doctrines, all concerned with comity, but each deriving from a seminal Supreme Court case and each serving slightly different purposes. The four doctrines are (1) the so-called *Pullman* doctrine, derived from *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941); (2) the *Burford* doctrine, derived from *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); (3) the *Younger v. Harris* doctrine derived from *Younger v. Harris*, 401 U.S. 37 (1971); and (4) the *Colorado River Water Conservation District* doctrine, derived from *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

In the case presently before us, defendant asserts that there are two types of abstention applicable, and we believe that as many as three support our dismissal of this action. These three are the *Pullman*, *Burford*, and *Younger* doctrines. We will address each doctrine in turn.

A. *Pullman* Abstention.

Pullman abstention is exercised by federal courts when, along with the constitutional issue in a case, there is an important state law issue which is unclear, and when

prompt resolution of the unsettled state law question will likely avoid the need for a constitutionally-based decision. The Supreme Court first developed and applied this doctrine in *Railroad Commission of Texas v. Pullman*, *supra*. In that case, the Texas Railroad Commission had ordered that Pullman sleeping cars must be attended at all times by a conductor, rather than a porter as was the custom on less travelled routes. The Commission's order had a racially discriminatory effect, because all conductors were white, while all porters were black.

In exercising *Pullman*-type abstention for the first time, the Supreme Court noted that the purpose of such restraint was to demonstrate "'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary." *Pullman*, 312 U.S. at 501. In *Pullman*, abstention was warranted because, along with the "substantial constitutional issue" (race discrimination) touching on "a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative . . . is open," *id.* at 498, there was a question of the statutory authority of the Railroad Commission to promulgate the discriminatory regulation. Because the law of Texas furnished "easy and ample means for determining the Commission's authority," *id.* at 501, and because the constitutional adjudication could plainly be avoided "if a definitive ruling on the state issue would terminate the controversy," *id.* at 498, the Supreme Court ruled that it was appropriate for the district court to stay the federal proceeding pending resolution of the state issue in the state court.

In cases subsequent to *Pullman*, the Supreme Court and the lower federal courts fleshed out this doctrine, making it clear that this doctrine of abstention

is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the

exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.

County of Allegheny v. Frank Mashuda Company, 360 U.S. 185, 188-189 (1959). Despite the narrowness of the doctrine, abstention is quite proper "when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Hawaii Housing Authority v. Midkiff*, 81 L.Ed. 2d 186, 194 (1984).

The overriding prerequisite to exercise of *Pullman* abstention appears, from the case law, to be that the state law question be "unsettled" and potentially dispositive. The Supreme Court has stated

The relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts *might* render adjudication of the federal question unnecessary. Rather, "[w]e have frequently emphasized abstention is not to be ordered unless the statute is of an uncertain nature, and is obviously susceptible of a limiting construction."

Hawaii Housing Authority, *supra*, at 195, quoting *Zwickler v. Koota*, 389 U.S. 241, 251 (1967).

The instant case is one in which there is clearly an unsettled and potentially dispositive issue of state law. The dispute between U.S.A.A. and the Insurance Department has, from the beginning, focused on the interpretation of § 641 of the Insurance Department Act. The Insurance Department relies on subsection (b) to support its mandate that U.S.A.A.'s affiliation with the U.S.A.A. Federal Savings Bank must be severed if U.S.A.A. is to retain its license to sell insurance in Pennsylvania. U.S.A.A. on the other hand, relies on subsections (c) and (a) (1) in arguing that the Insurance Department's interpretation of the Act is erroneous and that it need not divest itself of the Bank.

The language relied on by the Insurance Department, in pertinent part, reads "[N]o lending institution, public utility, bank holding company, savings and loan holding company, or any subsidiary or affiliate of the foregoing, . . . may, directly or indirectly, be licensed or admitted as an insurer or be licensed to sell insurance in this State" 40 Pa. C.S.A. § 281(b). In its enforcement communications with U.S.A.A., the Insurance Department apparently assumed that U.S.A.A. is a bank holding company. Bank holding companies, no matter where their banks are located, are barred from holding an insurance license in Pennsylvania, according to the Insurance Department's interpretation of this section.

Although this interpretation of § 641(b) appears to flow naturally from the clear language of subsection (b), an ambiguity arises when § 641 is read as a whole. Subsection (c) states the purposes of § 641:

to help maintain the separation between lending institutions and public utilities and the insurance business and to minimize the possibilities of unfair competitive practices by lending institutions and public utilities against insurance companies, agents and brokers.

40 Pa. C.S.A. § 281(c). "Lending institution" as used in subsection (c), and, indeed, in the whole of § 641, is defined as "any institution that accepts deposits and lends money in the Commonwealth of Pennsylvania" 40 Pa. C.S.A. § 281(a)(1). Given this definition of lending institution as limited to institutions accepting deposits and lending money in *Pennsylvania*, the clearly stated purpose of § 641 then, is to maintain separation between *Pennsylvania* lending institutions and the insurance business.

The Insurance Department's purportedly clear-meaning interpretation of § 641 (b) simply does not mesh with the clearly stated purpose of the section as expressed in

§ 641(c). In fact, as applied to U.S.A.A. and the U.S.A.A. Federal Savings Bank, a Texas lending institution, there is a blatant conflict between the stated purpose of § 641 and the result reached by literal application of subsection (b) to the instant situation. This conflict between subsections (b) and (c) is just the type of ambiguity that triggers the application of *Pullman* abstention. As confirmed by the Third Circuit in a recent ruling, abstention is appropriate even in a case where, as here, the ambiguity appears only when two otherwise clear statutory provisions are read side by side: "The need for state court interpretation results not only from unclear language on the face of a single statute, but also from the juxtaposition of clear, but contradictory state provisions." *Georgevich v. Strauss*, No. 84-5194, slip op. (3d Cir., September 5, 1985).

Once it is established that an ambiguity exists sufficient to call for application of the *Pullman* abstention doctrine, the district court must next determine whether resolution of the state law will avoid the need for a constitutionally-based decision. In this case, decision of the state law question is a logical prerequisite to consideration of U.S.A.A.'s constitutional challenges. If a court were to determine that the clearly articulated purpose of § 641(c) controls the interpretation of § 641(b), then U.S.A.A. would not be in violation of the statute and there would be no need to reach the constitutional issues.

Because we have determined that a potentially dispositive issue of state law exists, we must turn to the final consideration involved in *Pullman* abstention questions: are there the requisite "exceptional circumstances" and would abstention "clearly serve an important . . . interest"? See *County of Allegheny v. Frank Mashuda Company, supra*, at 189. In other words, are there considerations of comity that would mandate state court, rather than federal court, decision of the state law issue?

The answer in this case is yes. Under the McCarran-Ferguson Act, 15 U.S.C. § 1011-1105, power to regulate the insurance industry was given exclusively to the states. The ambiguous state statute in question is part of a comprehensive regulatory scheme implementing the power granted under the McCarran-Ferguson Act. Interpretation of such a statute and resolution of ambiguities therein should be left, therefore, in the first instance, to the state administrative machinery and eventually through appeals, to the state court system. *Accord, Mathias v. Lennon*, 474 F. Supp. 949 (S.D.N.Y. 1979) ("Not only would the New York court's decision have special authority on questions of New York law, but it undoubtedly possesses greater experience in dealing with the highly technical insurance statutes involved here." *Id.* at 955-56).

U.S.A.A. argues that we should not abstain in this case because of the delays inherent in abstention and because of the resulting prejudice to U.S.A.A. and its policyholders. U.S.A.A. claims that, if the state administrative and court system is permitted to decide the state law issue, U.S.A.A. will be deprived of its license to sell insurance in this state pending final adjudication of the constitutional claims. We do not agree with the conclusion that U.S.A.A. will be deprived of its license to its prejudice. Even assuming that the state courts fail to decide the state law issue in U.S.A.A.'s favor, U.S.A.A. will suffer no prejudice because of the availability of appeal and supersedeas procedures. These procedures will assure U.S.A.A. that, before its license is revoked and it is prohibited from doing business in Pennsylvania, it will have the opportunity to be heard on both the state law issue and the constitutional challenges.

U.S.A.A. also objects to abstention on the ground that abstention is inappropriate where the constitutional issue is a preemption claim based on the Supremacy Clause. We cannot accept this contention in this case because

preemption is not the only constitutional claim raised in the complaint, as U.S.A.A. should know.

B. *Burford Abstention.*

The second type of abstention applicable to this case is that exercised in *Burford v. Sun Oil Company*, 319 U.S. 315 (1943). In that case, the Texas Railroad Commission granted Burford a permit to drill four wells. Sun Oil brought an action in district court attacking the validity of the order granting the permit. In ruling that the federal courts should not involve themselves in essentially regulatory matters, the Supreme Court noted the confusion caused by such intervention:

The very "confusion" which the Texas legislature and Supreme Court feared might result from review by many state courts of the Railroad Commission's orders has resulted from the exercise of federal equity jurisdiction. . . . Delay, misunderstanding of local law and needless federal conflict with the State policy, are the inevitable product of this double system of review.

Burford, supra, at 327. In light of the problems inherent in the exercise of federal court jurisdiction over state regulatory matters when there is an extensive and complicated regulatory scheme, the Supreme Court held that abstention was the most appropriate course of action:

The State provides a unified method for the formation of policy and determination of cases by the Commission and by the state courts. The judicial review of the Commission's decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts. On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ulti-

mate review of the federal questions is fully preserved here. . . . Under such circumstances a sound respect for the independence of state action requires the federal equity court to stay its hand.

Id. at 333-34.

From the language of the Supreme Court in *Burford*, and in other cases raising similar issues, it appears that the central requirement for the exercise of *Burford* abstention is the existence of "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814 (1976); *Accord, County of Allegheny v. Frank Mashuda Company*, 360 U.S. 185, 189 (1959) ("This Court has also upheld an abstention on grounds of comity with the States when the exercise of jurisdiction by the federal court would disrupt a state administrative process, . . . or otherwise create needless friction by unnecessarily enjoining state officials from executing domestic policies. . .").

These types of state law questions bearing on important state issues have been recognized in a variety of contexts, including insurance regulation cases. In *Levy v. Lewis*, 635 F.2d 960 (2d Cir. 1980), the Second Circuit ruled that a dispute between retired employees of Consolidated Mutual Insurance Company and the liquidator of that company should have been left to the state administrative and court systems for determination. In applying *Burford* abstention, the court noted that "the federal courts have abstained in numerous areas where state regulation involved matters of substantial state concern and where state policies were carried out in a statutorily established regulatory program by state officials." The court found that the area of insurance regulation was an area in which state court and administrative systems deserved great deference by federal courts:

It is . . . highly significant that the state scheme has been adopted pursuant to congressional authorization. In the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1105, Congress mandated that regulation of the insurance industry be left to the individual states. Thus, the administrative and judicial scheme erected by New York to regulate insurance companies, including that part enabling institution and implementation of liquidation proceedings, operates pursuant to an express federal policy of noninterference in insurance matters. Federal courts have therefore been slow to interpret such schemes unless necessary, particularly when federal court action would impinge upon the area in which Congress has recognized the overriding interest of the states.

Levy, supra, at 963-964.

We find that *Burford* abstention is appropriate in this case not only because we agree with the Second Circuit in *Levy* that federal courts should be slow to disrupt state insurance regulatory schemes authorized by the McCarran-Ferguson Act, but also because of the extensive and complicated nature of the state regulatory scheme involved. The policies implemented by § 641 of the Pennsylvania Insurance Department Act are essentially state policies developed to protect state citizens and implement state concerns. As in *Burford* itself, the state in this case provides a "unified method for the formation of policy and determination of cases by the commission and by the state courts." *Burford, supra*, at 333. If the state procedure is followed from the Insurance Department up through the Commonwealth Court and the State Supreme Court, the state itself will have an opportunity to interpret and mold its own policies in this area of significant state concern, while at the same time, the federal questions will be preserved for ultimate review by the United States Supreme Court, if necessary. No disruption of the State administrative procedures will be

necessary, and the potential for conflicting and confusing federal court and state court rulings will disappear.

We do not agree with U.S.A.A.'s argument that abstention is inappropriate because the factual situation presented here does not involve the "business of insurance" and therefore is not governed by the McCarran-Ferguson Act. Even if § 641 does not directly regulate an "integral part of the policy relationship between the insurer and the insured," *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 129 (1982), the policies behind § 641 and designed to be implemented by § 641 may have everything to do with the relationship between insurers and insured. Formulation and implementation of such policies are strictly the province of the state's legislative and administrative bodies. To avoid federal interference in such an important area of state functioning, we must abstain from exercising our jurisdiction in this case.

We also do not agree that *Burford* abstention is inappropriate because the administrative proceeding in this case was instituted the same day as the motion to dismiss was filed. It is not a requirement of *Burford* abstention that there be a specific preexisting state proceeding to which the federal court may defer.¹ Rather, all that is required is that there be a pervasive regulatory scheme and a procedure within that scheme through which plaintiff's complaints may be addressed. See *Meicler v. Aetna Casualty and Surety Company*, 372 F. Supp. 509 (S.D. Texas 1974), *aff'd*, 506 F.2d 732 (5th Cir. 1975).

C. *Younger Abstention.*

The final abstention doctrine applicable to this case is the one derived from the *Younger v. Harris* case and

¹ Such a proceeding is required when exercising *Younger* abstention, however. This requirement will be discussed further in section C, *infra*.

its progeny. Although none of the parties in the instant case argued the merits of this doctrine in connection with the motion before us now, our review of the case law on abstention indicates that this third type of abstention is also applicable.

Younger abstention, originally a doctrine applicable only to actions brought in a federal court to enjoin state criminal proceedings, has broadened in recent years to include even federal actions to enjoin ongoing state administrative proceedings. See, *Williams v. The Red Bank Board of Education*, 662 F.2d 1008 (3d Cir. 1981). As noted by the Third Circuit in that case, the keystone of the *Younger* abstention doctrine is

the notion of "comity," that is, a proper respect to state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Id. at 1014, quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971).

According to the Third Circuit's reading of the *Younger* doctrine in the *Williams* case, *Younger* abstention is appropriate "where federal intervention into state administrative proceedings would be substantial and disruptive, and where the state proceedings are adequate to vindicate federal claims and reflect strong and compelling state interests." *Id.* at 1077. A prerequisite to such abstention, of course, is that there be an existing state proceeding to which the federal court may defer. *Hawaii Housing Authority v. Midkiff*, 81 L.Ed.2d 186, 195 (1984).

In the instant case the state administrative proceeding was instituted after U.S.A.A. filed its complaint in this court. The bare fact that the state proceeding came after

the initial filing in federal court does not render *Younger* abstention inapplicable, however. The Supreme Court stated in the *Hawaii Housing Authority* case that *Younger* abstention is appropriate "when state court proceedings are initiated 'before any proceedings of substance on the merits have taken place in the federal court.'" *Id.* at 195, quoting *Hicks v. Miranda*, 422 U.S. 332, 349 (1975). The state Order to Show Cause was issued by the Insurance Department in the instant case on the same day that defendant filed his motion to dismiss in federal court. This motion to dismiss was the first motion filed in the case. We do not believe that the mere filing of a motion means that proceedings of substance on the merits have taken place in federal court. Further, although the Order to Show Cause was not issued until December 24, 1984, the administrative enforcement machinery began rolling in July and August, 1984 when the Insurance Department formally communicated to U.S.A.A. its belief that U.S.A.A. was in violation of § 641.

Given that we find that there is a preexisting state administrative proceeding, we must next engage in the two-step analysis of the propriety of abstention recommended by the Third Circuit in *Williams*. The first step is to determine if the state's interest in going forward with the administrative proceeding without intrusion by the federal courts is sufficiently weighty to mandate *Younger* abstention. *Williams*, 662 F.2d at 1017. As noted in the prior analyses of the other types of abstention, the state's interest in regulating the insurance industry is a substantial one. Pennsylvania has established an extensive and comprehensive scheme for regulating the licensure and operations of insurance companies in this Commonwealth. Regulation of the insurance industry is committed solely to the states by the McCarran-Ferguson Act. Any intervention into this regulatory process by a federal court should not be taken lightly. Because insurance regulation is solely the concern of the states, and

because Pennsylvania has implemented an extensive scheme for that regulation, we find that Pennsylvania's interest in going forward with the administrative proceeding is sufficiently weighty to justify abstention under the *Younger* doctrine.²

The second prerequisite to the application of *Younger* abstention is that there be a state administrative forum adequate to vindicate the federal or constitutional claims raised by plaintiff. As we have already noted, Pennsylvania provides such a forum through its system of appeals to the Commonwealth Court and the state Supreme Court.

Because we find that the instant case meets all the prerequisites for *Younger* abstention, and because it involves regulation of the insurance business which is committed to the states, we hold that *Younger* abstention is appropriate in this case.

The appropriate procedure when a district court abstains from deciding a case or an issue more appropriately handled by the state courts is either a stay of the federal court proceedings or dismissal of the case from federal court altogether, depending upon the type of abstention exercised and a "consideration of what is appropriate to the circumstances of that case." *Williams v. The Red Bank Board of Education, supra*, at 1023, n. 15. Because we find today that the state administrative and court systems provide an opportunity for U.S.A.A. to raise all

² *Mathias v. Lennon*, 474 F.Supp. 949 (S.D. NY 1979), another district court case, also held that *Younger* abstention was appropriate in the context of an insurance dispute where there was a preexisting administrative proceeding. In that case the court said "[t]he fact that this case seeks to enjoin a ruling in a pending state proceeding, brought by a state official, implicating an important state concern and in which Mathias is fully able to raise the constitutional claims made here strongly supports the conclusion that the complaint should be dismissed." *Id.* at 956.

of its claims, and because successful pursuit of those claims in the state system will afford U.S.A.A. all of the relief it requests from this court, we will dismiss the action on abstention grounds.

/s/ R. Dixon Herman
R. DIXON HERMAN
United States District Judge

Dated: Sept. 30, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 84-1596

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Texas
Reciprocal Interinsurance Exchange and USAA CAS-
UALTY INSURANCE COMPANY, A Texas Stock Insurance
Company, and USAA LIFE INSURANCE COMPANY, a
Texas Stock Insurance Company, and USAA ANNUITY
AND LIFE INSURANCE COMPANY, a Texas Stock Insur-
ance Company,

Plaintiffs,

vs.

WILLIAM J. MUIR, III, Acting Insurance Commissioner
of the Commonwealth of Pennsylvania,

Defendant.

ORDER

AND NOW, this 30th day of September, 1985, IT IS
ORDERED that Defendant's motion to dismiss be and
hereby is granted.

The Clerk of Court is directed to close the file.

/s/ R. Dixon Herman
R. DIXON HERMAN
United States District Judge

